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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1989~~ 70-79

PIPEFITTERS LOCAL UNION NO. 562, LAWRENCE L. CALLANAN, JOHN L. LAWLER and GEORGE SEATON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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INDEX

Cases Cited

Statutes Cited

Texts Cited

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To the United States Court of Appeals For the Eighth Circuit

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit en banc, entered in this cause on November 24, 1970.

OPINION BELOW

The majority and dissenting opinions of the panel of the Eighth Circuit Court of Appeals are not yet reported and are printed as Appendix A, *infra*. The majority and dissenting opinions of the Court of Appeals *en banc* are not yet reported and are printed as Appendix B, *infra*, pp. A. 22-46.

JURISDICTION

The judgment of the Court of Appeals *en banc* (Appendix C, *infra*) was entered on November 24, 1970. A timely petition for rehearing was denied on December 17, 1970 (Appendix D, *infra*). On January 6, 1971, Mr. Justice White extended the time for filing of the petition for a writ of certiorari to February 1, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 610, Title 18, United States Code, as construed and applied by the Courts below and on its face, abridges the petitioners' rights, as well as the rights of all union members, of freedom of speech, press and assembly and the right to petition the Government for redress of grievances, in violation of the First Amendment of the Constitution of the United States?

2. Whether Section 610, Title 18, United States Code, as construed and applied by the Courts below and on its face, is so vague, indefinite and uncertain as to deprive petitioners of due process of law and fails to provide a reasonably ascertainable standard of guilt in violation of the Fifth and Sixth Amendments of the Constitution of the United States?

3. Whether Section 610, Title 18, United States Code, as construed and applied by the Courts below and on its face is an unjustifiable arbitrary discrimination which deprives unions, its members and persons of the laboring class of liberty and property without due process of law in violation of the Fifth Amendment?

4. Whether Section 610, Title 18, United States Code, as construed and applied by the Courts below and on its face, unlawfully abridges the rights of petitioners and all union members to vote and choose their Senators and

Representatives in Congress, as guaranteed by Article I, Section 2, and the Seventeenth Amendment to the Constitution of the United States?

5. Whether the Courts below improperly construed Section 610, Title 18, U. S. C. in holding that the indictment alleged an offense and the evidence was sufficient to sustain a conviction for conspiracy to violate Section 610, Title 18, United States Code, where both showed that the funds expended for political purposes were not funds of the union and were never commingled with the union funds, but instead were funds of a political organization which received its funds from direct voluntary contributions from individual members of the union and other individual pipefitters who worked under the jurisdiction of the union?

6. Whether the jury by making a special finding in its verdict "that a willful violation of Section 610 of Title 18 United States Code was not contemplated" found lacking an essential element of any conspiracy under Section 371, Title 18, United States Code to violate a substantive statute which is malum prohibitum, and thereby acquitted the petitioners?

7. Whether the District Court prejudicially erred in instructing the jury that it could find the defendants guilty even if it believed that all of the contributions to the separate Voluntary Fund were voluntarily made.

8. Whether the Court of Appeals *en banc* below erred in refusing to rule on the question as to whether the instructions of the District Court were incorrect.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 610, Title 18, U. S. C., provides as follows:

"It is unlawful for any national bank, or any corporation organized by authority of any law of Con-

gress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential or Vice-Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

"Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution in violation of this section shall be fined not more than $1,000 or imprisoned not more than one year or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"For the purpose of this section 'labor organization' means any organizations of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Section 371, Title 18, U. S. C., provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

First Amendment, Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment, Constitution of the United States provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property without due process of law;"

Sixth Amendment, Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation;"

Seventeenth Amendment, Constitution of the United States provides in pertinent part:

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have

> one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

Article I, Section 2, Constitution of the United States, provides in pertinent part:

> "The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

STATEMENT

Petitioners, Pipefitters Local 562 and three of its officers, were convicted by a jury verdict on a one-count indictment which charged them with having conspired from 1963 to the date of the indictment to violate Section 610, Title 18, U. S. C., by conspiring to have Pipefitters Local 562 make contributions and expenditures in elections for Federal Office (paragraph 9, A. pp. 1105-1106).* The indictment, detailed the alleged conspiracy by charging that petitioners "would establish and maintain a special fund entitled 'Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund,' which fund would have the appearance of being a wholly independent entity, separate and apart from Local 562 * * *" (paragraph 10, A. p. 1106); that petitioners, "in order to facilitate an orderly, regular and systematic collection of contributions to the Fund, would cause the agents of the Fund [being foremen, stewards, officers, members and employees of Local 562] to distribute to the pipefitters working at all job sites contribution agreement cards to be signed by such pipefitters," and that

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* "A" referenees are to the printed Appendix in the Court of Appeals.

such agents of the Fund, "would advise newly employed pipefitters at such job sites of the existence of the Fund and of the rates of participation" (paragraphs 15 and 16, A. pp. 1107-1108); that petitioners "by means of the creation and operation of the Fund would * * * [collect] for political purposes one dollar ($1.00) per day worked from members of defendant Local 562 and two dollars ($2.00) per day worked from non-member pipefitters employed on jobs within the jurisdiction of defendant Local 562" (paragraph 13, A. p. 1107); that such agents collected such contributions on such regular systematic basis on the job sites and at the headquarters of Local 562 (paragraphs 7, 15 and 16, A. pp. 1105, 1107-1108); that petitioners made contributions and expenditures to Federal candidates in the 1964 and 1966 elections by checks on said Fund in the approximate amount of $150,000 (paragraph 17; A. p. 1108); and finally that said Fund was in fact a Fund of Local 562 (paragraph 7, A. p. 1105).

The jury made a special finding "that a willful violation of Section 610, of Title 18, United States Code was not contemplated" (A. p. 1125). Each of the individual petitioners were sentenced to imprisonment for a term of one year and to pay a fine of $1,000.00 and the Union to pay a fine of $5,000.00 (Tr. 2093).

Pre-trial motions were filed in the District Court alleging, among other things, that the indictment was insufficient in that it did not allege that the contributions were involuntary. On the hearings on these motions, the Government asserted that it was their position that voluntariness of the contributions to the political fund was not an element of the offense. Throughout the trial the Government reasserted this position, confirmed in by the trial Court. For example, after the defense had adduced the testimony of 77 members of Local 562 that their contributions were voluntary or that they had made no con-

tributions at all without any adverse consequences upon them, the District Court in effect stopped the presentation of any more witnesses on the issue of voluntariness for the reason that the trial Court considered it cumulative. In doing so, the Court and Government both asserted that it was their positions that voluntariness of the contributions was not an element of the offense (A. 629).

Numerous instructions requested by the defendants dealing with the issue of voluntariness were rejected by the Court (A. 1096-1100). For example, defendants' refused Instruction BB (A. p. 1098) reads:

> "The Court instructs the jury that the law permits labor union members to set up a fund or organization for the collection of money to be used for making contributions to candidates for federal political office. The law merely prohibits money of a labor union from being used for such purposes. In this connection, money contributed by members of a labor union, voluntarily, for the purpose of being used for political purposes, with knowledge of such purpose is not money of a labor union. Therefore, if you find that contributions made to the Political, Educational, Legislative, Charity and Defense Fund were made by members of Local 562 voluntarily and that they were made by the members for political purposes then you must find the defendants not guilty."

Over objection, the jury was instructed that the fact that the payments into the Fund may have been made voluntarily by all of the contributors thereto does not, of itself mean that the money so paid into the Fund was not Union money (A. 1116). The instruction is set forth at p. A. 18 of the Appendix, *infra*. The Court then instructed the jury, in conformity with the position taken by the Court and Government throughout the trial, that the

jury could find that the Voluntary Fund was a Fund of the Local if it found that the Fund was routinely collected by officials of the Local on the job site; that the payments into the Fund were determined by a regular formula; that the payments began and terminated with employment on the job; and that moneys from the Fund were used to provide benefits to the Union members and were used for other activities which were permitted to be done by the Local itself (A. pp. 1112-1115). The instruction is set forth at pp. A. 18-A. 19 of the Appendix, *infra*. In other words, this case was tried throughout every stage, from the indictment to its conclusion, on the theory that voluntariness of the contributions was not an element of this offense and that the crime was shown simply by the method of collecting contributions to the Fund.

It was not alleged nor was there any evidence that any political contributions or expenditures were made out of the treasury of Local 562, which was maintained separate and distinct from the treasury and assets of the Voluntary Fund (A. p. 111). Likewise it was not alleged nor was there any evidence that any of the dues or assessments of Local 562 were ever paid into the Voluntary Fund or were ever transferred from the treasury of the Local itself (A. pp. 59-128).

The evidence showed that about 1949, a Voluntary Political, Educational and Legislative Fund was established by members of Local 562 and others working under the jurisdiction of the Local (A. pp. 972, 984). Until the end of the year 1962, separate collections were made from both members and non-members of Local 562 working under its jurisdiction for the Voluntary Political Fund, in a manner similar to the collection of the working assessments for the union itself (A. pp. 985, 1019-1020). The monies of the Fund were always kept and maintained separate and apart from the funds of the Local (A. pp.

350-351, 486) and were publicly disbursed by check by the Director of the Fund, who was also an officer of the Local (A. p. 1020).

From its inception, many of the men did not make contributions or payments into the Voluntary Political Fund (A. pp. 541, 553, 561, 868). There was an abundance of evidence that contributions were always on a voluntary basis.

A total of 77 members of Local 562 or other pipefitters who worked under the jurisdiction of Local 562 testified in behalf of the defense (A. pp. 527-772, 832-970). Thirty-two of them either did not contribute to the Voluntary Fund, had never contributed, or did not contribute regularly under the formula voted on by the contributors (A. pp. 540, 553, 561, 556, 572, 577, 579, 604, 617, 637, 685, 700, 704, 714, 718, 731, 752, 834, 838, 843, 850, 861, 864, 868, 871, 875, 886, 889, 893, 899, 901, 956). Some, even foremen (who were selected by the Local), who had worked steadily since the beginning of the Fund in 1949, had never contributed to the Fund nor been spoken to about not doing so (A. pp. 561, 541, 553, 869). One had never contributed because he was a Republican (A. p. 869). One foreman had always both refused to make collections for the Fund (A. p. 543), and refused to contribute because he was not in favor of some of the candidates supported by the Fund or did not feel he could afford it (A. pp. 543-544). Another such foreman did not believe that money spent on politics was helpful to labor (A. p. 558). Others, some foremen, quit giving several years before the trial without being questioned or discriminated against (A. pp. 556, 577, 601, 617, 685, 700, 714, 834, 844, 875). One foreman quit giving in 1965 because the Fund refused to support him when he ran for the Missouri Senate. He became angry and told Petitioner Callanan that he would no longer contribute. Peti-

tioner Callanan told him to do as he pleased because the Fund was purely voluntary (A. pp. 601, 603). Callanan also told another non-contributing member the same thing (A. p. 620). Another foreman quit contributing because he disagreed with some of the Fund's political endorsements (A. p. 835). Others just decided to quit, or had financial problems. The remainder made contributions when they chose to do so. All of these witnesses testified that they had never been discriminated against nor spoken to about not contributing, or not making the recommended contributions.

All defense witnesses who had contributed testified that their contributions were purely voluntary (A. pp. 527-772, 832-970). The defense was prepared to call many other such witnesses, but, in practical effect, was stopped by the Court from doing so for the reason that the testimony was cumulative (A. pp. 968-970). Indeed, both the Government and Court had earlier indicated that it was their positions that voluntariness of the contributions was not the essence of the offense (See, e. g., A. p. 629).

The Government had called as witnesses 15 pipefitters. Almost all of these witnesses testified that their contributions had always been voluntary (A. pp. 172, 191, 460, 260, 299, 345, 350, 485, 238); that no one, including petitioners, had ever put any pressure on them to contribute (A. pp. 172, 189, 191, 457, 316, 321, 347, 239, 383); that they had never been told by any petitioner or anyone else, to contribute (A. pp. 191, 460, 259, 321, 322, 347, 360, 240, 239, 361, 446, 483); that they had never told anyone, nor knew of anyone, who was given less work or denied work or union membership, for failing to contribute (A. pp. 460-461, 259-260, 288-289, 310-311, 321, 322, 359, 361, 364, 446, 382, 484, 240); that they had always told men that contributions were purely voluntary (A. pp. 170, 186, 189, 455, 253, 256, 258, 323, 339, 346, 360, 361, 419, 372-373, 382, 474, 480, 237).

After the return of this indictment the contributors to the Voluntary Fund, both members and non-members, met, pursuant to notice, and by a secret ballot voted to continue the Voluntary Fund, by a vote of 743 "Yes" and 5 "No". About 200 contributors who were not members of Local 562 were present at this meeting (A. pp. 128, 1016-1017).

In 1963[1] the Union obtained by contract check-off of working assessments. At that time the Voluntary Fund was reviewed by Harry Craig, a prominent St. Louis Labor Attorney (A. pp. 986, 1044, 1051-1052), and some changes were made in the Voluntary Fund. Thereafter, before accepting contributions, all contributors signed a voluntary contribution pledge card, which Craig designed (A. pp. 1001, 1043, 1061, D. Ex. A), and the name and purposes of the Fund was changed from "Voluntary, Political, Educational and Legislative Fund" to "Voluntary Political, Educational, Legislative, Charity and Defense Fund." At that time, attorney Craig advised the officers of Local 562 that they could legally establish a separate fund, administered and maintained apart from and not commingled with, Union funds, to be used for political purposes (A. pp. 1026, 1054, 1072-1073); that money received into said Fund could not be made a condition of employment or retention of employment or of union membership (A. pp. 1056, 1064-1065, 1067-1070, 1073, 1087); that the Local could solicit money for said Fund (A. p. 1060); that the contributors should first sign a pledge card showing that the contributions were going into the separate political (or other activity) Fund and were voluntary (A. pp. 1061, 1078); that the contributions could be collected in any manner, including soliciting and collecting on the job site by Union stewards and job foremen, when a man reported for work (A. pp. 1064-1065, 1067, 1070, 1071); that con-

[1] The indictment begins at this time.

tributions could be pledged and collected on a regular systematic formula based on amount of work (A. p. 1081); and that the Fund could accept contributions from some workers and exclude others (A. p. 1083).

At its highest peak, working assessments of members of the local were 3¾% of gross pay (or $1.48 per day), and it was recommended that contributions of 50¢ per day be made by members of the Local to the Voluntary Fund, for a total of about 5% of gross pay (A. pp. 1005-1007, 1008, 1010). It was recommended that non-members working under the jurisdiction of the Local, who could not legally pay working assessments to the Union, contribute $2.00 per 8 hours working day, or about 5% of their gross pay, to the Voluntary Fund (A. pp. 1008-1010).

During the indictment period the Voluntary Fund made contributions, all by check, to candidates for Federal Office. In 1964 they totaled $97,347; in 1965, $8,919; and in 1966, $45,146 (A. pp. 132-133). All contributions were made to DEMOCRATIC PARTY candidates.[2] Almost every contributor was a Democrat (A. pp. 172, 195, 461, 305, 322, 347, 361, 446, 483, 412, 529, 595, 613, 617, 634, 674). No contributor was found who was a Republican.

On appeal to the Eighth Circuit, petitioners raised the issues set forth in Questions Presented 1 through 6, *supra*,[3]

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[2] $10,897.38 Sen. Symington; $2,000.00 Dem. Cong. Com.; $35,000 Dem. Nat. Com.; $3,200 Cong. Sullivan; $150 Cong. Candidate McClanahan; $500 Sen. Candidate Harris; $4,000 Cong. Karsten; $5,000 Cong. Icord; $4,300 Cong. Price; $3,000 Cong. Frazier; $1,000 Sen. Proxmire; $42,000 President Johnson; $2,500 Cong. Bolling; $2,500 Sen. Hart; $2,500 Sen. Carvel; $8,869.05 Sen. Long of Missouri; $3,195.50 Cong. Candidate Joblocki; $1,000 Cong. Candidate Ryan; $1,000 Cong. Candidate Stalbaum; $2,000 Cong. Candidate Race; $10,000 Sen. Douglas; $2,000 Cong. Candidate Fogarty; $1,000 Cong. Candidate Fallon; $1,000 Cong. Candidate Haney; and $1,000 Cong. Candidate Harding (G. Exhs. 6-63, A. pp. 139-150).

[3] They were stated as set forth in Appendix E, *infra*, pp. A. 49-A. 50).

and took the position that Section 610 as thus construed and applied by the trial Court was unconstitutional and that they were entitled to an outright reversal of their convictions for that reason among others, rather than a new trial.

For the first time in the Government's brief in answer to petitioners' brief before the Eighth Circuit in panel, the Government changed its entire position as to the interpretation of the statute, and took the position that the contributions to the Fund by the members and non-members of Local 562 had been made involuntarily. Further, as Judge Heaney pointed out in his dissent both in panel and en Banc (*infra*, pp. A. 18, A. 29), the Government for the first time acknowledged in its brief that a Union acting through its officers, agents and members may form a political organization parallel to the Union and use Union personnel to solicit and spend direct voluntary contributions for Federal elections, contrary to the theory upon which the case had been tried. The Government also, for the first time, conceded that COPE and countless other labor political action groups had been so organized and operated.

In view of this ultimate but final acknowledgment by the Government in its brief, Judge Heaney, pursuant to the dictates of the Supreme Court in **United States v. Auto Workers**, 352 U. S. 567, and **United States v. C. I. O.**, 335 U. S. 106, *sua sponte*, ruled that, for the reason set forth in Question Presented 7, *supra*, a new trial should be granted in order to avoid facing the grave constitutional questions that had been created in this case by the application and construction of the statute by the trial Court.

The majority opinion in panel in the Court of Appeals, never actually ruled upon the issues that were raised in petitioners' brief there, as to whether or not the statute was unconstitutional as construed and applied by the Dis-

trict Court, and consequently by the jury in this case. It ignored the construction and application of Section 610 by the District Court. Thus, the majority opinion, in ruling on the sufficiency of the evidence, states that (p. 10): "It would appear to be unrealistic to believe that such a large number of workmen would make such substantial voluntary contributions to be used for political purposes unless they felt that their job security required them so to do." Then, the majority, in dealing with the First Amendment issue, which it acknowledged to be "substantial and difficult" (p. 10), ruled that Congress was "'attempting to protect the individual union member's right to his own political views and the right to support or not to support them through money contributions'" (p. 12). Thus interpreted, the majority held that Section 610 did not offend the First Amendment rights of labor union members to engage in political association, stating that "Separate voluntary political associations by union members are not in any way proscribed by the statute" (p. 13). Further, the majority, in dealing with the other difficult constitutional problems, said (p. 14): "Section 610 only prohibits [working men] from being forced into [political contributions]." Indeed, the majority opinion, like the Government's brief in the Court of Appeals, is permeated with words and phrases connoting the thought that the contributions to the separate Voluntary Fund, without the jury so finding, were involuntary.

Thereafter, on August 19, 1970, an unlimited rehearing was granted by the Eighth Circuit Court *en banc*. On August 26, 1970, petitioners wrote the clerk of the Eighth Circuit requesting permission to file a supplemental brief in connection with the rehearing of the case by the Court *en banc*. In doing so, petitioners specifically pointed out: "It is not our intention to rebrief the issues covered in our original brief but rather to deal supplementally with the issue considered by the dissent in the division decision."

Thereafter, on September 10, 1970, petitioners were informed by letter from the clerk of the Court that such a supplemental brief could be filed. A Supplemental Brief was filed by petitioners raising and briefing the question set forth in Question Presented 7 *supra*. The Government filed a brief in Answer to it, without objecting to its being heard and ruled on. Three of the seven members of the Court *en banc* ruled that the statute as construed and applied by the District Court is unconstitutional (Appendix, *infra*, p. A. 32). The other four members of the Court, in its opinion, *sua sponte*, dealt solely with the issue as to whether or not the Court could consider and rule upon Question Presented 7, *supra*, and held that it could not (Appendix, *infra*, pp. A. 23-A. 28). This issue was never briefed by the parties. The majority of four judges en banc also did not rule upon the grave constitutional issues that were raised by petitioners in their original briefs as to whether or not Section 610 as construed and applied by the District Court was unconstitutional, except to state that the "judgments of conviction and sentences imposed are affirmed for the reasons set out in the panel majority opinion filed June 8, 1970" (Appendix, *infra*, p. A. 23).

All of the dissenting Judges held that the instructions were prejudicially erroneous (Appendix, *infra*, p. A. 29). Further, Judge Heaney in his dissenting opinion, joined by Judges Lay and Bright, ruled, *inter alia*, that the refusal of the majority to rule on this issue (and thereby avoid the Constitutional questions) was in direct conflict with many decisions of this Court (Appendix, infra, pp. A. 32-A. 37). In addition, Judge Lay in his dissenting opinion, joined by Judges Heaney and Bright, held that 1) the trial Court's instructions were in fact attacked as error by petitioners in their original briefs, 2) the Court of Appeals set aside the original submission of the appeal, directed the parties to file supplemental briefs for the benefit of the Court *en banc* and the petitioners specifically

questioned the propriety of the instruction in said brief without any objection or claim of abandonment by the government, and 3) in the public interest and to guard against manifest injustice such an obvious error as the instructions presented should be corrected (Appendix, *infra*, A. 37-A. 46).

REASONS FOR GRANTING THE WRIT

1. *The Constitutional Questions.* The Court of Appeals, by a four to three vote, has rendered a decision deciding an important question of Federal Constitutional law which has not been, but should be, settled by this Court. The District Court construed Section 610 as prohibiting officers, agents and members of a union from forming a parallel political organization and utilizing the union leaders, officers and agents in such political organization, in the obtaining, pooling and expending of direct voluntary contributions for political purposes. Three judges of the Court of Appeals ruled that Section 610 as thus construed and applied by the District Court was unconstitutional. The other four Judges held the statute to be constitutional by adopting the panel majority opinion, which ignored the construction and application of the statute by the District Court and assumed that the contributions were involuntary. As noted, the jury had been instructed that it could convict even if it found that all the contributions to the separate fund were made voluntarily.

On one occasion Section 610, not so broadly construed and applied, was saved by this Court by a narrow construction of the word "expenditure," with four Justices of the Court believing it to be unconstitutional. **United States v. Congress of Industrial Organizations**, 335 U. S. 106, 68 S. Ct. 1349 (1948). On a second occasion, three Justices held Section 610 to be unconstitutional, with the majority not resolving that issue. **United States v. In-**

ternational Union United Automobile Workers of America (UAW-CIO), 352 U. S. 567, 77 S. Ct. 529 (1957). Heretofore no Court has ever ruled on the constitutionality of Section 610, but has always avoided such a ruling, pursuant to the dictates of the last two cited cases, by disposing of the case on some other issue, even where not raised by either party.

Indeed, this is the first case which the Government has ever prosecuted where the money expended for political purposes did not come from union dues. However, the word "expenditures" has been challenged several times. In none of the reported cases was a conviction sustained. In most cases it was held that the political expenditure there involved was not prohibited by the statute. **United States v. CIO**, *supra*; **United States v. UAW-CIO**, *supra*; **United States v. Painters Local Union No. 481**, 172 F. 2d 854 (2 Cir., 1949); **United States v. Construction and General Laborers Union No. 264**, 101 F. Supp. 869 (W. D. Mo. 1951). In the other two cases, although the money expended for political purposes had its source in union dues, the Court found no violation of the statute on some theory of voluntariness. **United States v. Warehouse and Distribution Workers Union Local 688**, 47 L. R. R. M. 2005 (E. D. Mo. 1960); **United States v. Anchorage Central Labor Council**, 193 F. Supp. 504 (D. Alaska 1961).

In the **CIO** case, this Court said (335 U. S. at 120) "it is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the Courts of any enactment that threatened abridgment of the freedoms of the First Amendment. It did not want to pass any legislation that would threaten interferences with the privileges of speech or press or that would undertake to supersede the Constitution. The obligation rests also upon this Court in construing Congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." This Court

later conceded that it "strained words" to avoid the serious constitutional issues presented in the **CIO** case. **United States v. Rumely**, 345 U. S. 41, 47, 73 S. Ct. 543 (1952).[4] To prohibit union members from voluntarily pooling their financial resources in political association, in an organization separate from the union, through their chosen leaders, raises far more serious constitutional doubts than the political expenditure made by the union itself in the **CIO** case.

A. *The First Amendment.* First Amendment rights enjoy a preferred status in our constitutional scheme,[5] and the most fundamental of all such First Amendment rights is the right of political association and expression.[6]

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[4] This Court has consistently followed the rule that where a statute is susceptible of two constructions, one raising serious constitutional questions, and the other avoiding them, the Court's duty is to adopt the latter construction. **United States v. CIO**, *supra*, 335 U. S. at 121; **United States v. Rumely**, *supra*; **Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.**, 365 U. S. 127, 138, 81 S. Ct. 523 (1961); **Harriman v. Interstate Commerce Commission**, 211 U. S. 407, 422, 29 S. Ct. 115 (1908).

[5] **New York Times Co. v. Sullivan**, 376 U. S. 254, 269-270, 84 S. Ct. 710 (1964); **Sherbert v. Verner**, 374 U. S. 398, 83 S. Ct. 1790 (1963); **Lamont v. Postmaster General**, 381 U. S. 301, 85 S. Ct. 1493 (1965); **United States v. Carolene Products Company**, 304 U. S. 144, 58 S. Ct. 778 (1938).

[6] **Sweezy v. New Hampshire**, 354 U. S. 234, 250, 77 S. Ct. 1203 (1957); **N. A. A. C. P. v. Button**, 371 U. S. 415, 430, 83 S. Ct. 328 (1963); **DeJonge v. Oregon**, 299 U. S. 353, 57 S. Ct. 255 (1937); **Machinist v. Street**, 367 U. S. 740, 812-816, 81 S. Ct. 1784 (Frankfurter dissenting) (1961); **United States v. CIO**, *supra*, 335 U. S. at 144 (Rutledge, J., concurring); **Stromberg v. California**, 283 U. S. 359, 369, 51 S. Ct. 532 (1931); **N. A. A. C. P. v. Alabama**, 357 U. S. 449, 78 S. Ct. 1163 (1958); **Watkins v. United States**, 354 U. S. 178, 77 S. Ct. 1173 (1957); **N. A. A. C. P. v. Alabama ex rel. Flowers**, 377 U. S. 288, 84 S. Ct. 1302 (1964); **Thomas v. Collins**, 323 U. S. 516, 65 S. Ct. 315 (1945); **Railroad Trainmen v. Virginia Bar**, 377 U. S. 1, 84 S. Ct. 1113 (1964); **United Mine Workers v. Illinois Bar Ass'n.**, 389 U. S. 217, 88 S. Ct. 353 (1967).

In **Sweezy v. New Hampshire**, 354 U. S. 234, 250, this Court said:

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations."

From this premise, that "political association" is a basic freedom protected by the First Amendment, this Court has found other group activities to be a form of political association. Thus, the N. A. A. C. P. Legal Defense and Educational Fund, Inc. was held to be a form of Political Association protected by the First Amendment (as incorporated in the Fourteenth Amendment) against state claims that it constituted solicitation of legal business. **N. A. A. C. P. v. Button**, *supra*, 371 U. S. at 429:

> "In the context of NAACP objectives, litigation is • • • a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression."

And it "may be the most effective form of political association" (at p. 431).

Likewise, other forms of orderly group activity to "achieve legitimate political ends" have been held to be protected by the First Amendment against regulatory assaults by government: to freely associate, without governmental regulation or compelled disclosure, for the advancement of beliefs and ideas (**N. A. A. C. P. v. Alabama**, *supra*; **N. A. A. C. P. v. Alabama ex rel. Flowers**, *supra*); to organize workers into a union (**Thomas v. Collins**, *supra*); to have minority political associations without

compelled disclosure thereof (**Sweezy v. New Hampshire**, *supra*); to furnish legal services to union members by the union (**Railroad Trainmen v. Virginia Bar**, *supra*; **UMW v. Illinois Bar Ass'n.**, *supra*); to assemble in public for peaceful political action and discussion of minority views (**DeJonge v. Oregon**, *supra*); to peacefully picket in public places (**Thornhill v. Alabama**, 310 U. S. 88, 60 S. Ct. 736 (1940); **Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.**, 391 U. S. 308, 313, 88 S. Ct. 1601 (1968)).

If Section 610 be left construed to cover the facts alleged in this indictment, as shown by the evidence, and as determined by the jury under the instructions, it will achieve the elimination of individual members of organized labor from participation in federal elections and to that extent from public affairs. For the statute as construed, and indeed on its face, denies individual rights of voluntary association for it forbids working men to associate and act through their labor leaders in the political field to protect their collective rights. Even though the choice of candidates may determine whether those rights will be secured or destroyed, the statute as construed, prohibits union members from protecting and advancing those rights, by spending jointly any money, through a parallel political organization, to express their opposition to a candidate, even if the members are unanimous in their action. At the least, we believe, this Court should determine this issue.

B. *Fifth Amendment—Vagueness.* It is a fundamental and well established principle of our constitutional system that vague, indefinite and uncertain statutes imposing criminal sanctions are prohibited.[7] On numerous occasions,

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[7] **United States v. L. Cohen Grocery Co.**, 255 U. S. 81, 41 S. Ct. 298 (1921); **United States v. Cardiff**, 344 U. S. 174, 73 S. Ct. 189 (1952); **Rabeck v. New York**, 391 U. S. 462, 88 S. Ct. 1716 (1968); **Baggett v. Bullitt**, 377 U. S. 360, 84 S. Ct. 1316

vague statutes have been declared void as violative of the Fifth, Sixth and Fourteenth Amendments. The vices inherent in unconstitutionality vague statutes are the risks of unfair prosecution and the potential deterrence of constitutionally protected conduct. **Cramp v. Board of Pub. Instruction of Orange County, Fla.**, 368 U. S. 278, 283, 82 S. Ct. 275 (1961).

The lower Courts' interpretation and application of Section 610 to the case at bar demonstrates the statute's constitutional infirmity. The District Court interpreted the statute to include the Pipefitters' Voluntary Fund by overruling the motion to dismiss, by denying the motions for judgment of acquittal and by its instructions (A. pp. 1095, 1112-1115). The Court instructed the jury that it could find that a separate voluntary political fund was in fact a union fund by any and all circumstances in evidence (A. pp. 1112-1115), and even though all contributions were voluntary (A. p. 1116). This interpretation was made by the Court despite the legislative history to the effect that a separate voluntary fund, such as the one here, is excluded from the criminal sanctions of Section 610 (93 Cong. Rec. 6437-47) and without any judicial support or any prior prosecution. Thus, as applied and interpreted by the District Court, Section 610 is unconstitutionally vague as it failed to give petitioners fair warning of its scope. Indeed, it amounted to a retroactive, unforseeable judicial enlargement of the statute.

Unless this Court determines the issue, all unions and union members now do not know what they are permitted

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(1964); **Giaccio v. Pennsylvania**, 382 U. S. 399, 86 S. Ct. 518 (1966); **Connally v. General Construction Co.**, 269 U. S. 385, 46 S. Ct. 126 (1926); **Herndon v. Lowry**, 301 U. S. 242, 57 S. Ct. 732 (1937); **Lanzetta v. New Jersey**, 306 U. S. 451, 59 S. Ct. 618 (1939); **Stromberg v. California**, 283 U. S. 359, 51 S. Ct. 532 (1931); **Winters v. New York**, 333 U. S. 507, 68 S. Ct. 665 (1948).

to do in Federal elections. This was clearly demonstrated by an *Amicus Curiae* Brief filed in the Court below by the American Federation of Labor and Congress of Industrial Organizations. In that Brief it is stated (at p. ii) that "many labor unions have set up political organizations as an integral subdivision of the union itself. These political arms of organized labor serve a dual function: utilizing dues moneys, they engage in educational activity directed at the union's members, and utilizing voluntary donations, which are kept in separate segregated funds, they channel the flow of contributions and expenditures in connection with federal elections." Thus, it is seen these voluntary donations are far more identified with the union than was the Voluntary Fund in the instant case. This is probably due to the fact that the Voluntary Fund here was organized pursuant to the carefully considered advice of competent labor lawyers. We respectfully submit that this Court should not leave the statute interpreted in such an indefinite state.

C. *Fifth Amendment—Discrimination.* Encompassed within the due process clause of the Fifth Amendment is the prohibition against unjustifiable arbitrary and discriminatory governmental action.[8] Section 610, as construed by the district Court, is such an unjustifiable discrimination as to violate the due process clause of the Fifth Amendment. Under the Court's interpretation, persons of the laboring class are practically prohibited from group political action in any form, whereas many other groups of people with mutual interest are given free rein to influence elections. For example, corporate officials, other wealthy employer type persons and their families

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[8] **Schneider v. Rusk**, 377 U. S. 163, 168, 84 S. Ct. 1187 (1964); **Bolling v. Sharpe**, 347 U. S. 497, 74 S. Ct. 693 (1954), opinion supp., 439 U. S. 294, 75 S. Ct. 753 (1955); **Hirabayashi v. United States**, 320 U. S. 81, 100, 63 S. Ct. 1375 (1943); **Nichols v. Coolidge**, 274 U. S. 531, 542, 47 S. Ct. 710 (1927).

make large political contributions through such organizations as the National Association of Manufacturers and the Chamber of Commerce. These management and business associations represent the counterpart to union members' separate voluntary political funds. Yet, the counterpart of the union members voluntary fund are nowhere prohibited by federal law from making astronomical group political donations to elect hostile candidates to the labor movement and to pass legislation injurious to labor.

The impact of unorganized individuals of ordinary means on politics is very little, which necessitates association and central direction. Unions, which are associations of working men with common interests, have been political active in varying degrees since their formation. Unions have influenced social and economic reform both in the corporate plant and in the governmental process. Political participation was necessary for union birth and is still essential to union survival. **Machinists v. Street,** *supra*, 367 U. S. 740, 812-816, 81 S. Ct. 1784 (1961, Frankfurter dissent); **United States v. C. I. O.,** *supra*, 335 U. S. 106, 144, 68 S. Ct. 1349 (1948, Rutledge concurring). As Mr. Justice Frankfurter stated in **Machinists v. Street,** *supra*, at 814-815: "It is not true in life that political protection is irrelevant to, and insulated from, economic interests. * * * Neither is it true for labor."

Moreover, there are a myriad of other groups and associations not restricted by Section 610, which, although not traditionally opposed to labor, present tangible disadvantages to labor. The American Medical Association for instance, spent more than three and one half million dollars to fight medicare in the 1950 campaign. Hyde & Wolff, **The American Medical Association: Power, Purpose and Politics in Organized Medicine,** 63 Yale L. Journ. 938, 1012-17 (1954).

If laboring people with mutual interests may be lawfully prohibited from pooling their financial resources for po-

litical purposes, thus it should follow that other groups with mutual interests may also be prohibited from doing so. Yet this Court has said that such associations are protected by the Constitution in pooling and spending their money for political purposes. See e. g., **N. A. A. C. P. v. Button**, 371 U. S. 415 (1963).

Petitioners submit that this Court should review Section 610's inherent inequality, particularly in view of the lower Courts unwarranted enlargement thereof.

D. *Article 1, Sec. 2 and Seventeenth Amendment.* A blanket prohibition of union members associating and pooling their financial resources for political expression through their chosen leaders also abridges the constitutional right of the defendants and all union members to choose their federal representatives. The provisions of Article I, Section 2, and of the Seventeenth Amendment to the Constitution specifically confirm the right of the people to elect Congressmen and Senators. Thus, the right of qualified voters to choose their congressional representatives is given federal constitutional protection. **Ex parte Yarborough**, 110 U. S. 651, 4 S. Ct. 152 (1884); **Wiley v. Sinkler**, 179 U. S. 58, 21 S. Ct. 17 (1900); **Swafford v. Templeton**, 185 U. S. 487, 22 S. Ct. 783 (1902); **United States v. Mosely**, 238 U. S. 383, 35 S. Ct. 904 (1913); **United States v. Classic**, 313 U. S. 299, 61 S. Ct. 1031 (1941); **United States v. Saylor**, 322 U. S. 385, 64 S. Ct. 1101 (1944); **Smith v. Allwright**, 321 U. S. 649, 64 S. Ct. 757 (1944); **Gray v. Sanders**, 372 U. S. 368, 83 S. Ct. 801 (1963); **Wesberry v. Sanders**, 376 U. S. 1, 84 S. Ct. 526 (1963).

The Courts have held the following to be attributes of the right to vote which Congress may protect, either by application of criminal sanctions or provision for civil relief:

(a) The right to vote, either in a general election or in a primary, which is an integral part of the electoral process (**Ex Parte Yarborough**, *supra*; **Wiley v. Sinkler**, *supra*; **Swafford v. Templeton**, *supra*; **Smith v. Allwright**, *supra*).

(b) The right to have the force of the vote protected against ballot stuffing (**United States v. Saylor**, *supra*; **Ledford v. United States**, 155 F. 2d 574 (6th Cir. 1946), cert. denied, 329 U. S. 733), or against the votes of unqualified voters (**United States v. Wilson**, 72 F. Supp. 812 (W. D. Mo. 1947)), or against dilution by disapportioned districts (**Gray v. Sanders**, *supra*; **Wesberry v. Sanders**, *supra*).

(c) The right of a qualified voter to register (**United States v. Ellis**, 43 F. Supp. 321 (W. D. S. C. 1942)).

(d) The right to sit on an election board, or to act as judge, inspector or poll clerk at an election for Congressman or Senator (**United States v. Aczel**, 219 Fed. 917 (D. Ind. 1915)).

The constitutional right of a qualified voter to make an effective choice of Congressional representatives requires more than mere protection of the mechanics of the casting and counting of ballots; it requires group political action.

In summary, Section 610 as construed and applied as well as on its face establishes a most dangerous departure from the American tradition of group political activity. As Mr. Justice Rutledge stated with respect to Section 610 in the **CIO** case, *supra*, 335 U. S. at 147, "the accepted principle of majority rule which has become a bulwark, indeed perhaps the leading characteristic, of collective activities is rejected in favor of atomized individual rule and action in matters of political advocacy . . ." Manifestly, a nation cannot maintain effective democratic government if every individual voter must act alone. It is

only through association in groups that he can further his general economic interests and hope to achieve any political effectiveness in our complex modern society. As this Court said in **Sweezy**, *supra*, 354 U. S. at 250: "Exercise of these basic freedoms [of political expression] in America has traditionally been through the media of political associations." Indeed, it is submitted that our tradition of group political activity embodies a fundamental constitutional right. Congressional power to guard the free exercise of the civil rights of voters cannot be converted into Congressional power substantially to destroy or impair them. Yet, this is the immediate effect of this statute as construed and applied on the freedom of working men and women to protect their interests as union members. It deprives union members of their only organized means of protection of their interests in many of the most important political issues of the day.

2. *Construction of Section 610, Title 18, U. S. C.* Because Section 610 only prohibits contributions by Labor Unions, it was incumbent on the Government to prove that the monies of the Voluntary Fund were in fact monies of Local 562. The Government, however, readily admitted that the Fund did not appear on its face to be a fund of the Local.

Thus, the indictment alleged that the Pipefitters Voluntary, Political, etc., Fund "was a fund of defendant Local 562" (Paragraph 7). But it affirmatively alleged that the Voluntary Fund was a "special fund" which had "the appearance of being a wholly independent entity" (Paragraph 10; see also Paragraph 16). Nowhere did the indictment allege that the funds expended or contributed come from dues or the general funds of the Local, and there was no evidence of such. Further, a reading of the indictment as a whole showed that the funds expended did not come from union dues, but were collected and main-

tained separate and apart from the dues structure of the Local (see Paragraphs 7, 10, 11, 13, 15, 16), as the evidence also showed. The indictment did not allege that the payments were involuntary nor that the contributors did not know that their contributions were to be used for political purposes. Though the separate Fund and its political contributions were widely publicized for many years, the Government claimed that it was maintained separate from the union as a desire to conceal that it was union money, and that it in fact was the money of Local 562.

Certainly the evidence was insufficient to prove that the monies of the Voluntary Fund were monies of Local 562 in the light of the legislative history of Section 610 which shows a clear legislative intent to exclude a separate union political fund from the orbit of Section 610 (93 Cong. Rec. 6437-47).

Not only were the contributors to the Voluntary Fund in the instant case fully aware that their donations were to be used for political purposes, but also there was no minority among them. They were all Democrats and favorable to the Democratic candidates to whom the contributions were made. The one Republican who testified had always refused to contribute to the Voluntary Fund.

Although the District Court instructed the jury that it could find that the monies of the separate Fund were union money even though all the contributions to it were made voluntarily, we submit that if, on the contrary, the contributions to the separate Fund had been coerced, this would not convert the money into union ownerships. If so, a corporation would be guilty of making a political contribution if it coerced an officer of the company into making a direct political contribution from his own personal assets. Further such corporation would also be guilty

of making a political contribution if it induced a supplier into making a political contribution by threats of boycott.

We respectfully submit that the evidence wholly failed to establish a conspiracy to violate Section 610. On the contrary, the evidence showed that the defendants and other union members created a political organization, parallel to the Local, in the manner in which Congress intended to approve, to accept direct voluntary contributions to be expended for political and other purposes.

3. *The jury's special finding.* The jury in its verdict found the petitioners guilty as charged in the indictment and further found "that a willful violation of Section 610 of Title 18, United States Code, was not contemplated." The panel decision of the United States Court of Appeals for the Eighth Circuit held that the jury's verdict did not lack essential elements of conspiracy under 18 U S. C., § 371, stating:

> "When the verdict is read in light of the applicable law and the court's instructions, we are satisfied that the jury by its verdict intended to and in fact did convict the defendants of the conspiracy charged."

The reasoning behind this holding was that the jury's verdict in finding "that a willful violation of Section 610 . . . was not contemplated" was for the purpose of advising the trial court that petitioners were guilty of conspiracy to commit a misdemeanor for "guiding the court in assessing a permissible penalty." The Court of Appeals, therefore, in affirming the form of the verdict, in effect held that there need not be wrongful intent in the crime of conspiracy—that is *scienter* and *mens rea* need not be shown at all in conspiracy.

As such, the decisions of the United States Court of Appeals for the Eighth Circuit in the instant case are directly in conflict with decisions of the Sixth Circuit in

Landen v. United States, 299 Fed. 75, 78-79 (6th Cir., 1924), and the Tenth Circuit in **Cruz v. United States,** 106 F. 2d 828, 830 (10th Cir., 1939). These cases hold that if the substantive act that is conspired to be committed be *malum in se,* intent merely requires knowledge of the relevant facts, so that the parties know what they are planning; but if the substantive act conspired to be committed be not wrongful in itself and merely made unlawful by statute (*malum prohibitum*) conspiracy to violate that statute does not exist without knowledge that the contemplated acts violate the law. See also, **Developments in the Law, Criminal Conspiracy,** 72 Harv. L. Rev. 920, 936-37 (1959); Perkins, **Criminal Law,** 545-46 (1957).

This Court has never decided this important question affecting the administration of criminal justice with respect to conspiracies to violate a law of the United States, which as in the instant case is merely *malum prohibitum.* In 1945, four members of this Court indicated that they thought criminal intent was not required in a conspiracy to commit a substantive offense which does not require criminal intent. **Keegan v. United States,** 325 U. S. 478, 506 (1945) (Stone, C. J., Reed, Douglas, and Jackson, J. J., dissenting). The case at bar presents a singular opportunity for the Court to review and settle the applicable law.

4. *The Court's Instructions.* The Court instructed the jury (A. p. 1116):

> "A great deal of evidence has been introduced on the question of whether the payments into the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund by members of Local 562 and others working under its jurisdiction were voluntary or involuntary. This evidence is relevant for your consideration, along with all of other facts and circumstances in evidence, in determining whether

the fund is a union fund **However, the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money.**" [Emphasis added.]

This instruction was objected to by petitioners for the reason that "voluntariness is an ultimate issue in this case, and if the money was voluntarily paid, then it is not union money" (A. p. 1093). Numerous instructions requested by petitioners dealing with this issue were rejected by the Court. Defs. requested Instructions Nos. S, T, Z, AA, VV, YY (A. pp. 1096-1100). For example, defendants' refused Instruction BB (A. p. 1098) reads:

"The Court instructs the jury that the law permits labor union members to set up a fund or organization for the collection of money to be used for making contributions to candidates for federal political office. The law merely prohibits money of a labor union from being used for such purposes. In this connection, money contributed by members of a labor union, voluntarily, for the purpose of being used for political purposes with knowledge of such purpose is not money of a labor union. Therefore, if you find that contributions made to the Political, Educational, Legislative, Charity and Defense Fund were made by members of Local 562 voluntarily and that they were made by the members for political purposes then you must find the defendants not guilty."[9]

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[9] The majority opinion of the Court below *en banc* concedes that "at trial appellants requested an instruction submitting the issue of voluntariness, and objected to the instruction which made reference to this question. See Footnote 2, Judge Heaney's dissenting opinion, reported at ... F. 2d ... (8th Cir. 1970). Thus, there can be no doubt that appellants laid the proper foundation in the district court for challenging on appeal the propriety of the submission of the case to the jury" (Appendix, *infra*; p. A. 23).

The instructions were clearly erroneous. The legislative history makes it abundantly clear that a union acting through its officers, agents and members may form a political organization parallel to the union and use union personnel to solicit and spend direct voluntary contributions for federal elections[10] (93 Cong. Rec. 6437-6447). See also **United States v. Auto Workers**, *supra*, 352 U. S. 567, 592; **United States v. C. I. O.**, *supra*, 335 U. S. 106, 123; Comments, 46 Marquette Law. Rev. 364, 366 (1963); Clover, **Political Contributions by Labor Unions**, 40 Texas Law. Rev. 665, 670 (1962).

It is clear that Congress in enacting Section 610, not only was sensitive to the constitutional implications of the statute, but also was aware of the need for labor unions to participate in politics, so long as the dues of a dissenting minority were excluded. The sponsors of the bill readily gave strong assurances to doubting Senators that unions could continue to spend money in politics so long as the dues of a possible minority were protected. Congress was aware of the need for Unions to remain active in politics, and intended that they could do so through their leaders by forming parallel political organizations to obtain and expend direct voluntary contributions for political purposes.

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[10] As Judge Heaney pointed out (Appendix, pp. A. 18-A. 19, *infra*):

"The government acknowledges in its brief that a union acting through its officers, agents and members may form a political organization parallel to the union and use union personnel to solicit and spend direct voluntary contributions for federal elections. It concedes that COPE and countless other political action groups have been so organized and operated. The difficulty with this acknowledgement is that it comes too late. The trial Court, although requested to, refused to give an instruction embodying this concept. Indeed, the thrust of its direction was that the very participation of union officers and agents in the organization and operation of the political fund was evidence of impropriety."

The three dissenting judges in the Court below held that the instructions were prejudicially erroneous. The four-majority did not rule on this question. Thus, no Judge of the Court below has ever held that the instructions were correct.

5. *The refusal of the Court below to Rule on the correctness of the Instructions.* The majority of the Court of Appeals *en banc sua sponte* refused to rule on the question as to whether the District Court's instructions were erroneous. Indeed, it held that it could not legally do so because the question had not been raised specifically by petitioners in their original brief, although it had been raised, with the consent of the Court and without objection by the Government, in a Supplemental Brief filed with the Court *en banc* before the oral arguments. In so holding, the decision of the Court below *en banc* is in direct conflict with this Court's decisions in **United States v. Congress of Industrial Organizations**, *supra*, 335 U. S. 106, 110, 125; **United States v. International Union United Automobile Workers of America**, *supra*, 352 U. S. 567, 590-592.

CONCLUSION

For the reasons stated herein, we respectfully submit that the Petition should be granted.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 19,466

APPENDIX

Appellee,

No. 562,

Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

(June 8, 1970.)

Before Van Oosterhout, Chief Judge.

Defendants Papermakers Local Union No. 562, Lawrence L. Callahan, John L. Lawler and George Seaton were tried by a jury on an indictment charging them with conspiracy under 18 U.S.C.A. § 371 to violate 18 U.S.C.A. § 610 which prohibits labor organizations from making contributions and expenditures to candidates for federal offices. Each defendant was found guilty by the jury. Under instructions given, the jury determined a willful violation of § 610 was not contemplated. The union was fined $5,000. The individual defendants, who were officers of Local 562, were each sentenced to one year imprisonment and fined

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 19,466.

United States of America,
Appellee,
v.
Pipefitters Local Union No. 562, etc., et al.,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

[June 8, 1970.]

VAN OOSTERHOUT, Chief Judge.

Defendants Pipefitters Local Union No. 562, Lawrence L. Callanan, John L. Lawler and George Seaton were tried by a jury on indictment charging them with conspiracy under 18 U.S.C.A. § 371 to violate 18 U.S.C.A. § 610 which prohibits labor organizations from making contributions and expenditures to candidates for federal offices. Each defendant was found guilty by the jury. Under instructions given, the jury determined a willful violation of § 610 was not contemplated. The union was fined $5,000. The individual defendants, who were officers of Local 562, were each sentenced to one year imprisonment and fined

$1,000. All defendants have taken a timely appeal from their conviction and sentence.

As grounds for reversal, all defendants urge prejudicial errors were committed by the trial court in the following respects:

I. Failure to sustain defendants' motions for acquittal made at the close of the government's case and renewed at the close of all of the evidence based upon the grounds: (1) That the evidence introduced in the case was insufficient to sustain a conviction. (2) There was a material and prejudicial variance between the allegations of the indictment and the proof offered.

II. Failure to hold that § 610 as construed and applied by the court violates rights guaranteed defendants by the First, Fifth, Sixth and Seventeenth Amendments to the Constitution of the United States.

III. Failure to hold that the provision in the jury verdict that a willful violation of § 610 was not contemplated requires an acquittal of all defendants.

We affirm the convictions for the reasons hereinafter set out.

BACKGROUND.

Section 610 to the extent here pertinent reads:

> "It is unlawful for any . . . labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices. . . ."

The origin, legislative history and purpose of § 610 is discussed in detail in *United States* v. *C.I.O.*, 335 U.S. 106,

and in *United States* v. *International Union,* 352 U.S. 567. It is pointed out that Congress in 1907 enacted a statute making it unlawful for any corporation to make a money contribution in connection with an election for federal office in furtherance of the public interest for free elections. Such prohibition was later extended to labor organizations and this legislation in its present form is found in § 610. With respect to corporations, the Court in *United States* v. *C.I.O.* states:

> "This legislation seems to have been motivated by two considerations: First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." 335 U.S. 106, 113.

With respect to extending the legislation to labor organizations, the Court in the same case observes:

> "Its legislative history indicates congressional belief that labor unions should then be put under the same restraints as had been imposed upon corporations. It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose." 335 U.S. 106, 115.

Mr. Justice Rutledge, in reviewing the legislative history of the extension of the Corrupt Practices Act to labor organizations, indicates:

> "[I]n one important respect the history again is clear, namely, that the sponsors and proponents had in mind three principal objectives.
>
> "These were: (1) To reduce what had come to be regarded in the light of recent experience as the undue

and disproportionate influence of labor unions upon federal elections; (2) to preserve the purity of such elections and of official conduct ensuing from the choices made in them against the use of aggregated wealth by union as well as corporate entities; and (3) to protect union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views. Shortly, these objects may be designated as the 'undue influence,' 'purity of elections,' and 'minority protection' objectives. These are obviously interrelated, but not identical. And the differences as well as their combination become important for deciding the scope of the section's coverage and its validity in specific application." 335 U.S. 106, 134-35.

THE MOTIONS TO ACQUIT.

Defendants' timely motions to acquit were based on two grounds: (1) A material variance between the allegations of the indictment and the proof, and (2) the insufficiency of the evidence to support the convictions. Defendants urge that the indictment was insufficiently clear with respect to the source of the funds used in the conspiracy charge. Such contentions lack merit.

The indictment is lengthy and elaborate. Sixty-one overt acts are charged. The indictment charged that the defendants established the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund, hereinafter called the fund, to have the appearance of being a wholly independent entity separate from Local 562 and thereby conceal the fact that Local 562 would make contributions and expenditures in connection with certain elections. The indictment outlined defendants' complicated scheme to conceal the true nature of their activity and concluded by alleging that such activity amounted to an unlawful use of union funds contrary to § 610.

In *United States* v. *Lewis Food Co.*, 9 Cir., 366 F.2d, 710, 713, the court holds, "the allegation in the indictment that the corporation made an 'expenditure' for the stated purpose, necessarily infers an allegation that general corporate funds were used."

The failure of the indictment to allege that the payments to the fund were involuntary is not fatal. The gist of the government's claim as reflected by the indictment is that the money in the fund is in truth and in fact money belonging to Local 562.[1] If such allegation is established by

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1 While instructions given by the court to the jury are not relevant or controlling in determining the law to be applied in ruling upon motions for acquittal, it appears extremely likely that the court would apply the law as set forth in its instructions in passing upon the motions. Included in the instructions i the following:

"You will note that Section 610 prohibits contributions by labor organizations for use in connection with an election for a federal office. It does not prohibit any person from making or agreeing to make such contributions or setting up an independent fund for such purpose separate and distinct from union funds either alone or in conjunction with others, simply because such person happens to be a member of a labor organization. That is, the statute is not violated unless the [2,070] contribution is in fact, and in the final analysis made by the labor organization.

"In this case evidence was offered by the Government to the effect that funds were contributed to or on behalf of candidates for federal office and that such funds were paid out upon checks drawn upon the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund. It is necessary, therefore, that the evidence establish that the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund was in fact a union fund, that the money therein was union money, and that the real contributor to the candidates was the union. As to this issue, the defendants contend that the fund in question was a bona fide entity separate and apart from the union, established by the voluntary good faith act of members of the pipefitters Local 562 and others, from which contributions to candidates were made on behalf of the persons who created the fund and not on behalf of the union. On the other hand, the Government contends that the fund was a mere artifice or device set up by the defendants and others as a part of the alleged conspiracy to give the outward appearance of being an independent and separate entity but in fact constituting a part of union funds.

* * * * * * *

"A great deal of evidence has been introduced on the question of whether the payments into the Pipefitters Voluntary Political, Edu-

the evidence, the issue of whether the payment to the fund is voluntary or involuntary is not controlling.

Of course as observed by the court in its instructions, the issue of whether the payments to the fund were voluntary is relevant and material on the issue of whether the fund is the property of Local 562. Other considerations such as the intention of the donors as to ownership and control of the fund also bear upon the issue.

We now pass to the issue of the sufficiency of the evidence to support the convictions. The evidence must be viewed in the light most favorable to the party prevailing in the jury trial, here the government. *Glasser* v. *United States*, 315 U.S. 60, 80. When the evidence is so viewed, we find ample evidentiary support for the jury verdict.

The essential elements of a § 610 offense are (1) contribution or expenditure, (2) by a labor organization, (3) for the purpose of active electioneering (4) in connection with an election for named federal offices described in the statute. It is virtually undisputed that elements (1), (3) and (4) are clearly established. The controversy relates to whether the contributions or expenditures were made by a labor organization. A labor organization is defined in § 610. Local 562 clearly fits the description of a labor organization. Thus if the numerous substantial contributions made to federal office candidates were made by Local 562, the contributions were made by a labor organization. On the other hand if the voluntary fund is a separate and distinct entity and it made the contribu-

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cational, Legislative, Charity and Defense Fund by members of Local 562 and others working under its jurisdiction were voluntary or involuntary. This evidence is relevant for your consideration, along with all other facts and circumstances in evidence, in determining whether the fund is a union fund. However, the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money."

tions, no violation of § 610 would exist as the voluntary fund as a separate entity would not constitute a labor organization.

Contributions alleged to be voluntary by members of Local 562 and members of other unions working within its jurisdiction aggregating $1,230,968 were made during the indictment period (1963-1968). The proceeds of such collections were maintained in a separate bank account of the fund. Disbursements out of the fund for aid of candidates for federal office during the indictment period aggregated $151,412. There is substantial evidence to support a jury finding that the fund was not a bona fide separate and distinct entity but was in fact a device set up to circumvent the provisions of § 610 and that the fund constituted union money. We will not attempt to set out the voluminous evidence, much of which is conflicting, in detail. Assessments had been made for the political fund since 1949. In 1962, the assessment for the fund for members of Local 562 and those working within its jurisdiction was 50¢ per man for each day worked. Local 562 abandoned collections through assessments in 1963.

In 1962, the union launched a campaign for check off of dues by employers of its members. Originally it was contemplated, as shown by the union minutes, that the check off be for 4% of the wages paid plus dues with 1½% included in the 4% going to the fund.

The local deliberately kept its membership relatively small so that advantageous employment would be available at all times for its members. It had jurisdiction over work covering a large part of the state of Missouri. Local 562 provided a considerable amount of work for members of other locals at more favorable rates of pay than prevailed in the jurisdiction of the locals. The attorney for the union advised the union that he was fearful that if Local 562 accepted dues and assessments from non-members it would

be required to accept them into membership in Local 562. He also recommended that the contribution to the fund not be collected by check off and that voluntary pledge cards for the fund be obtained from those working on Local 562 projects and that the funds be raised through voluntary contributions. Thereafter Local 562 voted to reduce the assessment from 4% to 2½% of the wages and further that no assessments be made against non-members. Signatures of non-members and members working on Local 562 projects were obtained on voluntary contribution cards under which the signers who were members of Local 562 agreed to contribute $1.00 per 8 hour working day to the fund, with non-members agreeing to contribute $1.50 per 8 hour day. The extra 50¢ per day for non-members was equivalent to the cancellation of the 50¢ per day assessment which was abandoned. Subsequently the contribution of non-members was raised to $2.00 per working day.

When the assessment of members was raised in 1966 from $1.00 to $1.50 per day, contributions to the voluntary fund were reduced from $1.00 to 50¢ per day leaving the total combined assessment and contribution to tho voluntary fund in the same total figure as previously existed.

The non-members of Local 562 working on its projects were not charged the customary $8.00 per month travel card assessment. However, their contribution to the fund substantially equalled the combined assessment and voluntary contribution made to the fund by members.

The contributions to the fund were generally collected regularly by the foreman on the job site in substantially the same manner in which assessments had previously been collected. Collection sheets were provided with columns containing the names of the employees, the number of hours worked and the amount paid to the fund. The purpose of keeping the records was so that the officers would know who contributed to the fund and how much. Reasons

such as sickness or vacation were placed on the report sheet with respect to persons from whom no assessment was collected for the period covered. On some reports reference is made to back assessments.

A number of foremen testified that they did not know what would happen if the contribution was not paid because all of the members working under them regularly made payments to the fund.

There is evidence that a limited number did not make a contribution to the fund and that no reprisals were taken against them. Ordinarily such failure to pay was taken up with the union officials and instructions were received by the collectors not to press for payment. There is also testimony that the people working on the projects considered their employment advantageous and felt that they had no choice except to make the contribution. It would appear to be unrealistic to believe that such a large number of workmen would make such substantial voluntary contributions to be used for political purposes unless they felt that their job security required them so to do.

The union received national recognition because of its generous political contributions. The minutes of the local meeting of June 9, 1964, reflect that the union president had been introduced to President Johnson as "the representative of the most active political membership in the United States."

The fund was freely used for making payments to serve many other union purposes. We are satisfied that all of the essential elements of conspiracy charged are supported by substantial evidence.

CONSTITUTIONAL ISSUES.

Substantial and difficult problems are presented by the constitutional issues raised by the defendants. A minority of the Court in *United States* v. *C.I.O.*, supra, and *United*

States v. *International Union*, supra, expressed the view that § 610 was unconstitutional. The majority by reason of its interpretation of the statute did not reach the constitutional issue. We shall treat separately the constitutional issues raised.

A. FIRST AMENDMENT.

It is clear that the First Amendment protects the freedom of association, *NAACP* v. *Alabama*, 357 U.S. 449, and that the activities of a labor union are within the scope of this protection. *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217. Since 18 U.S.C.A. § 610 regulates the activities of a labor union, it must be evaluated in light of First Amendment principles.

Finding that particular activities are within the purview of the First Amendment does not necessarily mean that they are free from governmental regulation. The rights of association are not absolute and may be regulated by the government in certain instances. *Dennis* v. *United States*, 341 U.S. 494; *Garner* v. *Board of Public Works*, 341 U.S. 716.

In order to determine the validity of governmental regulation which touches constitutionally protected rights, the Court in *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 51, indicated that "that perforce requires an appropriate weighing of the respective interests involved." Therefore, a court must balance the interest of the government in the regulation against the interest of the individual and the organization in their freedom of association. Since the value of the freedom of association is considered extremely high in our society, if a governmental regulation of association is to prevail against constitutional attack, the government must demonstrate a "compelling" interest in the regulation in question. See *Bridges* v. *California*, 314 U.S. 252; Cf. *Sherbert* v. *Verner*, 374 U.S. 398. There-

fore, in order to determine the validity of 18 U.S.C.A. § 610, the court must find a compelling governmental interest which overrides the interest of the association in the activities prohibited. There is such a compelling interest.

Since it is possible for a person to be required to join a union as a condition of employment, one of the purposes for the passage of 18 U.S.C.A. § 610 was to "protect union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views." Mr. Justice Douglas concurring in *International Association of Machinists* v. *Street,* 367 U.S. 740, thought this to be an extremely troublesome problem. He said:

> "[M]embership in a group cannot be conditioned on the individual's acceptance of the group's philosophy. Otherwise, First Amendment rights are required to be exchanged for the group's attitude, philosophy or politics. I do not see how this is permissible under the Constitution." 367 U.S. 740, 777.

Congress in passing 18 U.S.C.A. § 610 was attempting to protect the individual union member's right to his own political views and the right to support or not to support them through money contributions. In light of the substantial interest each individual has in his own political activities, it follows that Congress in passing the legislation was responding to a compelling interest.

Even when it is found that the government has acted to protect a compelling interest, the First Amendment requires further analysis. To this point the Court in *Shelton* v. *Tucker,* 364 U.S. 479, 488, said:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved. The breadth of legislative abridgement must be viewed in

> light of less drastic means for achieving the same basic purpose."

The issue under this analysis is whether 18 U.S.C.A. § 610 narrowly achieves the legitimate Congressional purpose without needlessly treading on constitutional rights.

When § 610 is given the interpretation previously discussed in this opinion, it does not go beyond protecting the valid governmental interest and infringe unnecessarily on constitutional rights. Separate voluntary political associations by union members are not in any way proscribed by the statute. Therefore, § 610 is not unconstitutional under the First Amendment.

B. VAGUENESS.

It is of course necessary to evaluate § 610 in relation to the concept of constitutional vagueness. This principle was set out in *United States* v. *Harriss*, 347 U.S. 612, 617, where the Court said:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

The Court in *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287, added:

> "The vice of unconstitutional vagueness is further aggravated where, . . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution."

The vagueness problem therefore is whether a person could know from reading § 610 what is proscribed by its terms.

One matter which was previously pointed out was that substance rather than form governs the question of whether a particular contribution or expenditure came from a "labor organization." Such approach requires a court or jury to evaluate the totality of the circumstances and determine who in fact made the contribution or expenditure—a separate and distinct organization or a § 610 labor organization. The legality of the conduct of a labor organization making contributions or expenditures is not difficult to determine. A labor organization can predict what its officials and employees may do by evaluating the organization's duty under § 610 and not allow its officials and employees to engage in conduct which is inconsistent with this duty.

C. DUE PROCESS—EQUAL PROTECTION.

The due process clause of the Fifth Amendment includes within it a concept of equal protection. *Bolling* v. *Sharpe*, 347 U.S. 497. Therefore, the federal government, as well as the states, is not allowed to pass legislation which makes arbitrary classifications. The appellants argue that § 610 makes an arbitrary classification because it prevents members of the working class from political action whereas members of richer classes are not so prohibited, even though banks and corporations are also prohibited from making political contributions and expenditures. The argument is that the corporate executives personally make political contributions which have an impact on the political process, and § 610 prohibits members of the working class from aggregating their funds to have a similar impact. The problem with this argument is that § 610 does not prohibit working men from such activity. Section 610 only prohibits them from being forced into it. Therefore, § 610 does not create a classification which is subject to an equal protection claim.

D. RIGHT TO VOTE FOR SENATORS AND REPRESENTATIVES.

It has been argued that § 610 abridges the right to vote for Congressmen and Senators. This argument is based on the assumption that § 610 prohibits any labor group from associating and engaging in political activities. As previously pointed out this is not the proper construction of § 610. When § 610 is given the interpretation as described in this opinion, this argument totally lacks merit.

EFFECT OF JURY FINDING THAT A WILLFUL VIOLATION OF § 610 WAS NOT CONTEMPLATED.

The signed jury verdict Form B returned by the jury found each defendant guilty as charged in the indictment and then went on to say, "We further find that a willful violation of Section 610 of Title 18, United States Code, was not contemplated."

Defendants urge that the quoted sentence requires an acquittal on the conspiracy charge. We do not agree.

Verdict Form B together with Form A finding the defendants guilty without containing the sentence hereinabove quoted were submitted to the court under an instruction that "Form B may be used by you only in the event you find one or more of the defendants guilty of the willful conspiracy charged and further find that the conspiracy of which said defendant is found guilty did not contemplate a willful violation of § 610."

Section 610 carries a penalty of a fine not to exceed $5000 for a corporation or labor organization and not to exceed $1000 or one-year imprisonment for individual defendants. The statute further provides that if the violation

was willful the penalty is a fine up to $10,000 and imprisonment up to two years. Eighteen U.S.C.A. § 371 under which defendants were tried and convicted contains a provision that if the offense, the commission of which is the object of the conspiracy is a misdemeanor only, the punishment shall not exceed the maximum imposed for the misdemeanor. Eighteen U.S.C.A. § 1 defines a misdemeanor as an offense carrying a penalty of one year or less imprisonment. Thus it would appear that the clear purpose of the instruction and verdict Form B was to advise the court whether defendants were guilty of conspiracy to commit a misdemeanor or a felony for the purpose of guiding the court in assessing a permissible penalty.

The court in its instructions properly set forth the elements of the conspiracy including the necessity of proving that each defendant knowingly and willfully participated in the conspiracy to violate § 610. Included in the instructions is the following:

> "The crime charged in this case requires proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the Government must prove that the defendant knowingly, willfully and purposely did an act which the law forbids. Such intent may be determined from all the facts and circumstances shown by the evidence.
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> "An act is done 'willfully' if done voluntarily and purposely and with the specific intent to do that which the law forbids; that is to say, with bad purpose either to disobey or to disregard the law."

The necessity of proving willfulness as an element of the conspiracy is repeated in various places in the instructions.

When the verdict is read in the light of the applicable law and the court's instructions, we are satisfied that the

jury by its verdict intended to and in fact did convict the defendants of the conspiracy charged.

It is also of some significance that the defendants took no exception to verdict Form B or the instructions relating to its submission. Defendants were in no way prejudiced by the submission of Form B. The jury finding in the last sentence of the form in reality amounted only to a finding that the conspiracy related to a misdemeanor rather than a felony and defendants were thus benefited by such finding by being exposed only to the lesser sentence provided in § 371 for conspiracy, the object of which is a misdemeanor.

Defendants have made no attack on this appeal upon any instructions given by the trial court or to the evidentiary rulings. We conclude that the defendants have had a fair trial and that they have failed to establish that the court has committed any prejudicial error.

The judgments appealed from are affirmed.

HEANEY, Circuit Judge, dissents and reserves the right to file a dissenting opinion setting out his views.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 19,466.

United States of America,
Appellee,

v.

Pipefitters Local Union No. 562, etc., et al.,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 17, 1970.]

Before VAN OOSTERHOUT, Chief Judge; BLACKMUN and HEANEY, Circuit Judges.

HEANEY, Circuit Judge, dissenting.

While I share the view of the majority that the indictment was not fatally defective, I would reverse and remand to the trial court with instructions to it to grant the defendants a new trial. See, *United States* v. *Lewis Food Company*, 366 F.2d 710 (9th Cir. 1966).[1] At this new trial, the principal question would be whether, in the light of all the evidence, the contributions to the federal candi-

1 "All that is required of an indictment is that it be a plain, concise and definite written statement of essential facts constituting the offense charged. Rule 7(c), Federal Rules of Criminal Procedure; *Rood* v. *United States*, 8 Cir., 340 F.2d 506, 510. With respect to the use of general corporate funds this indictment meets these requirements. Entry of the plea of not guilty, therefore, gave rise to a question of fact as to the source of the corporate funds. When the Su-

dates were made from funds which could fairly be said to have been voluntarily contributed by members and non-members with knowledge of the fact that all or part of their contribution would be used for political purposes. See, *United States* v. *International Union,* 352 U.S. 567, 592 (1957); 93 Cong. Rec. 6437-6440 (1947).

There is evidence in this record indicating that the contributions to the Pipefitters' fund were, in the above sense, knowingly and voluntarily made. There is also substantial evidence to the contrary. But the jury was specifically instructed that it could find the defendants guilty even if it believed all of the contributions were voluntarily made.[2] Such an instruction was, in my view, erroneous.

The government acknowledges in its brief that a union acting through its officers, agents and members may form a political organization parallel to the union and use union personnel to solicit and spend direct voluntary contributions for federal elections. It concedes that COPE and countless other political action groups have been so organized and operated. The difficulty with this acknowledgement is that it comes too late. The trial court, although requested to, refused to give an instruction embodying

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preme Court, in the *Auto Workers* case, asked (352 U.S. at 592, 77 S.Ct. at 542): '[W]as the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis?' The Court was referring to questions of fact which must be resolved at the trial level and was not referring to any inadequacies in the indictment."

United States v. *Lewis Food Company,* 366 F.2d 710, 713 (9th Cir. 1966).

2 "A great deal of evidence has been introduced on the question of whether the payments into the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund by members of Local 562 and others working under its jurisdiction were voluntary or involuntary. This evidence is relevant for your consideration, along with all other facts and circumstances in evidence, in determining whether the fund is a union fund. However, the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money."

this concept. Indeed, the thrust of its direction was that the very participation of union officers and agents in the organization and operation of the political fund was evidence of impropriety. Compare, *Machinists Union* v. *Street*, 376 U.S. 70 (1961).

The government contends in its brief that the contributions to the fund were in fact assessments, were in fact part of the general dues' structure and were in fact involuntarily made. These may indeed be the facts and if the jury had made such a finding, a violation of Section 610 would have been made out. But again, this the jury was not requested to so find. It was instructed to answer the broader question of whether the contributed funds constituted a part of the Union funds. Nineteen facts and circumstances were listed as bearing on the answer to this question.[3] Some of the facts and circumstances were rele-

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3 "1. Whether or not payments to the fund were routinely made at regular intervals at job sites,

"2. Whether or not payments to the fund were routinely collected by union stewards, foremen, area foremen, general foremen, or other agents of the union,

"3. Whether or not the payment to the fund was determined by a formula based upon the amount of hours or overtime hours worked upon a job under the supervision of the union,

"4. Whether or not payments to the fund were at one rate for 562 members and at a different rate for members of other unions,

"5. Whether or not payments to the fund began, continued and terminated with employment on a job under the jurisdiction of the union,

"6. Whether or not monies of the fund were used to provide benefits to union members in their capacity as members,

"7. Whether or not payments to the fund by members of other unions were in lieu of payments to the union in the form of travel card dues in the amount of eight dollars per month,

"8. Whether or not monies of the fund were used in part to promote activities properly permitted to the union pursuant to Section 2.05 of its Constitution and by-laws,

"9. Whether or not payments to the fund were made by those affiliated with the union to the general exclusion of other classes of persons or organizations,

vant to the issue of knowledge and voluntariness and others, irrelevant. One example of the latter was the instruction that the jury could consider whether the payments to the fund were routinely collected by the Union Stewards and agents of the Union at the job site.

The government further contends that the political funds were spent by the individual defendants arbitrarily and without consultation with the contributors. There is some evidence in the record to support this contention. Although such a practice is of questionable legality and is undesirable and undemocratic, it constitutes no violation of Section 610.

The argument is also made by the government that at least one official of the fund diverted a portion of the funds collected for political purposes to his personal use.

"10. Whether or not contributions to the fund were required as a condition of employment or continued employment of membership in Local 562,

"11. Whether or not the individuals who contributed to said fund signed a voluntary contribution agreement,

"12. Whether or not the contributions to said fund were made voluntarily or involuntarily,

"13. Whether or not the monies contributed to said fund were kept separate and distinct from the funds of Local 562,

"14. Whether or not some persons who worked under the jurisdiction of Local 562 did not contribute to said fund,

"15. Whether or not the monies of said fund were used in part to promote activities which were prohibited to Local 562 by its Constitution and By-Laws,

"16. Whether or not said fund was established and maintained pursuant to the advice of counsel,

"17. Whether or not the monies of said fund were reported to the Department of Labor on the LM-2 forms, which required the reporting of monies of Local 562,

"18. Whether or not expenditures from the fund were under the control of the union and its officers,

"19. Whether or not records used in the collection of the payments to the fund are similar to those employed from time to time by the union in the collection of its regular dues and assessments."

While this act may also have been illegal and reprehensible, it was not a violation of the statute.

Finally, the government contends on appeal that the fund was used to provide benefits to some of the members of the Union. There is again evidence in the record to support this contention but the fact of the matter is that the fund was established for educational, legislative, charitable and defense as well as political purposes. And as I read Section 610, there is nothing in it which prohibits a union, its officers and agents from soliciting voluntary contributions for political and other purposes so long as those contributing know that all or part of the funds will be used in support of political candidates.

Nothing I have said in this opinion should be taken to indicate that a union or its officers and agents can evade the prohibitions of Section 610 by obtaining contribution cards from contributors indicating that the contributions were voluntarily made for political purposes. The test is whether the contributions are in fact so made.

Because I would remand for a new trial, I find it unnecessary to pass on the First Amendment validity of Section 610. This issue can be reached if the defendants are convicted under proper instructions.

I likewise express no view on the question of whether the jury's finding that a willful violation of Section 610 was not contemplated by the defendants required a reversal on the conspiracy charge. I am confident that on retrial, the verdict forms would eliminate this ambiguity.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 19,466.

United States of America,
Appellee,

v.

Pipefitters Local Union No. 562, etc., et al.,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri Upon Rehearing in Banc.

[November 24, 1970.]

Before MATTHES, Chief Judge; VAN OOSTERHOUT, MEHAFFY, GIBSON, LAY, HEANEY and BRIGHT, Circuit Judges.

PER CURIAM.

On June 8, 1970, the conviction of Pipefitters Local Union No. 562, Lawrence L. Callanan, John L. Lawler and George Seaton on a charge of conspiracy under 18 U.S.C.A. § 371 to violate 18 U.S.C.A. § 610, which makes it unlawful for a labor organization to make a contribution or expenditure in connection with any election to federal office, was affirmed by a panel of this court consisting of Judges Van Oosterhout, Blackmun and Heaney. Judge Heaney filed a dissent. The opinion is reported at ... F.2d ....

Thereafter on August 19, 1970, a rehearing in banc was granted by a majority vote of the active judges of this court and the judgment affirming the conviction was vacated and set aside. The court in banc on October 14, 1970, heard this case.

The judgments of conviction and sentences imposed are affirmed for the reasons set out in the panel majority opinion filed June 8, 1970. Judgment shall be entered accordingly. Affirmed.

MATTHES, Chief Judge, with whom Judges VAN OOSTERHOUT, MEHAFFY and GIBSON join, concurring.

I join in the affirmance of the judgment of conviction. The course traveled by this appeal in this court, as a result of my brother Heaney's dissenting opinion, motivates me to express my views in regard to procedural aspects of an appeal in the hope that this court, whether sitting en banc or as a panel, hereafter will adhere to what I regard to be deeply entrenched principles applicable to the consideration and disposition of cases by courts of appeals.

From the outset of this case appellants challenged the constitutionality of 18 U.S.C. § 610 and sought dismissal of the indictment on that ground. The validity of the statute was a live issue throughout the trial. Additionally, at trial appellants requested an instruction submitting the issue of voluntariness, and objected to the instruction which made reference to this question. See Footnote 2, Judge Heaney's dissenting opinion, reported at ... F.2d ... (8th Cir. 1970). Thus, there can be no doubt that appellants laid the proper foundation in the district court for challenging on appeal the propriety of the submission of the case to the jury. But appellants, represented by a battery of retained counsel, experienced and skilled in the

defense of criminal cases, on appeal abandoned all errors asserted during the trial and elected to proceed in this court by presenting only issues for review designed to bring about an outright reversal and discharge of the appellants.

Appellants' initial exhaustive brief, consisting of 38 pages, stands as irrefutable evidence that they were consciously and purposefully foregoing any relief on the ground of trial irregularities. Manifestly, they were familiar with the provisions of Rule 28(a), Federal Rules of Appellate Procedure, relating to the contents of the brief of an appellant, and included in their brief a "Statement Of Issues Presented For Review." These issues summarized were:

I. The indictment failed to allege an offense under 18 U.S.C. § 610;

II. Section 610 is unconstitutional because it abridged appellants' and all union members First Amendment rights;

III. Section 610 is unconstitutional because of vagueness;

IV. Section 610 deprives unions and its members of liberty and property without due process, in violation of the Fifth Amendment;

V. Section 610, as construed and applied by the district court, unlawfully abridges the rights of appellants to vote and to choose their senators and representatives in Congress as guaranteed by Article I, Section 2 and the Seventeenth Amendment to the Constitution;

VI. The verdict of the jury negating a willful violation of § 610 required an acquittal on the conspiracy charge.

In the expansive development of the foregoing issues in the argument portion of appellants' brief, there is no hint

or suggestion of error in giving or rejecting instructions. And to remove any doubt as to the precise relief sought by appellants in this court they concluded their brief with this statement:

"CONCLUSION.

For each of the reasons stated herein above, we respectfully submit that the judgment below should be reversed. Each of said reasons requires a reversal without a new trial, and no request is made for a new trial. The relief sought, and impelled by said reasons, is a reversal and discharge of the defendants."

The majority of the original panel, which affirmed, squarely met and considered the issues presented by appellants. But, notwithstanding the obvious, namely, that appellants had deliberately and consciously elected to abandon and waive any and all claims of prejudicial trial errors, my brother Heaney, sua sponte, injected an issue foreign to appellants' brief, faulted the district court for not properly instructing the jury as to whether the contributions to candidates had been voluntarily made, and voted to remand for another trial.

The rules designed to govern appellate procedure clearly delineated in the Federal Rules of Appellate Procedure, and sanctioned by many decisions, convinces me that a court of appeals should confine its review to the issues which an appellant properly raises and presents in his brief. Certainly, the reviewing court should not assume the role of an advocate and engage in the practice of ferreting out errors deliberately and consciously abandoned by an appellant, in order to grant relief not asked for, but in fact specifically disclaimed. Such gratuitous procedure by the reviewing court does not, in my view, comport with the proper and orderly administration of justice.

The salutary purpose of Rule 28(a)(2), Federal Rules of Appellate Procedure, providing that the brief of an

appellant shall contain "[a] statement of the issues presented for review"[1] and of pre-1968 local rules of this court, has been spelled out in meaningful language. This court, speaking through Judge Kimbrough Stone, stated, "[t]he purpose of the rule is to definitely and separately point out the errors complained of in order to clearly *define* and *confine* the issues on appeal." (Emphasis supplied.) *New York Casualty Co.* v. *Young Men's C. Assn.*, 119 F.2d 387, 389 (8th Cir. 1941); Accord, *Cohen* v. *United States*, 142 F.2d 861, 863 (8th Cir. 1944); *Turner County S.D.* v. *Miller*, 170 F.2d 820, 828 (8th Cir. 1948);[2] *Mogis* v. *Lyman-Richey Sand & Gravel Corp.*, 189 F.2d 130, 133;[3] *Chain Institute* v. *Federal Trade Commission*, 246 F.2d 231, 235 (8th Cir. 1957); *Bell* v. *United States*, 251 F.2d 490, 493-94 (8th Cir. 1958).[4] In *McIntosh* v. *United States*, 362 F. 2d 636 (8th Cir. 1966), Judge Blackmun, now an Associate Justice of the Supreme Court, reiterated that specifications of error not urged in brief or appeal are abandoned. Finally, in *Smith* v. *American Guild of Variety Artists*, 368 F. 2d 511; 514 (8th Cir. 1966), Judge Van Oosterhout again recognized the rule and supported the court's refusal to consider a point not raised or briefed with numerous citations. But see *Daclede Gas Co.* v. *N.L.R.B.*, ... F.2d ... (8th Cir. 1970),[5] where Judges Heaney and Lay remanded the case to the National Labor Relations Board for consideration of an issue not raised on appeal. Judge Van Oosterhout dissented on the ground

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1 The Federal Rules of Appellate Procedure became effective July 1, 1968.

2 This case holds that an unargued assertion of error is waived.

3 This case stands for the proposition that contentions of error in the trial court not presented on appeal will be considered as having been abandoned.

4 In the *Bell* case, Judge Van Oosterhout cites numerous cases supporting the rule.

5 This case did not present any constitutional issues.

that since the issue was not raised the cause should not be remanded.

I am not unmindful that the United States Supreme Court has established the principle that "[i]f two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided." *Alma Motors Co.* v. *Timken-Detroit Axle Co.*, 329 U.S. 129, 136, 67 S.Ct. 231, 91 L.ed. 128 (1946); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (Brandeis, J., concurring); *Clay* v. *Sun Insurance Office*, 363 U.S. 207 (1959).[6] Nor am I unaware of the practice of the Supreme Court of refusing to decide constitutional questions when other grounds of decision can be found in the *record*, whether or not they have been properly raised before the court by the parties. *Neese* v. *Southern Ry.*, 350 U.S. 77 (1955); *Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 119-20 (1961) (Douglas, J., dissenting).

But, notwithstanding this principle, and with due deference to the teachings of the Supreme Court, the conclusion is inescapable that the practice and procedure in the United States courts of appeals are governed by the Federal Rules of Appellate Procedure.

It is known generally by the federal bench and the members of the legal profession that for a number of years many judges, lawyers and legal scholars recognized a compelling need for uniform rules to govern the practice and procedure in the United States court of appeals. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, after lengthy,

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[6] In *Clay*, Justice Black states that the principle has never been made a rule and elevated to a position of absoluteness but its application is merely discretionary, to be used under the proper circumstances. 363 U.S. at 222-26 (dissenting opinion).

responsible and deliberate study and consideration, culminated its efforts, and on December 4, 1967, the Supreme Court of the United States, by appropriate order, adopted the Federal Rules of Appellate Procedure. The Supreme Court, in its order of adoption, provided that these rules are to govern the practice in appeals to United States courts of appeals from the United States district courts, and the review of the United States courts of appeals of decisions of specified lower federal agencies. Rule 1 provides that "these rules govern practice in appeals to United States courts of appeals from the United States district courts and the Tax Court of the United States; . . . ."

Thus, the conclusion is inescapable that the Supreme Court has decreed through adoption of the rules that all appeals in the courts of appeals are to be governed by the provisions of the Federal Rules of Appellate Procedure. These rules are easily understood. They mean what they say. They are binding upon every judge of every court of appeals and should be adhered to, not ignored. If courts of appeals are permitted to engage in fashioning remedies according to the dictates of the judges and contrary to the guidelines enunciated in the rules, one of the objectives so long sought and finally achieved—*uniformity of practice and procedure*—will effectively be scrapped.

HEANEY, Circuit Judge, dissenting.

While I share the view of the majority that the indictment was not fatally defective, I would reverse and remand to the trial court with instructions to it to grant the defendants a new trial. See, *United States* v. *Lewis Food Company*, 366 F.2d 710 (9th Cir. 1966).[1] At this

1 "All that is required of an indictment is that it be a plain, concise and definite written statement of essential facts constituting the offense charged. Rule 7(c), Federal Rules of Criminal Procedure; Rood v. United States, 8 Cir., 340 F.2d 506, 510. With respect to the

new trial, the principal question would be whether, in the light of all the evidence, the contributions to the federal candidates were made from funds which could fairly be said to have been voluntarily contributed by members and nonmembers with knowledge of the fact that all or part of their contribution would be used for political purposes. See, *United States* v. *International Union*, 352 U.S. 567, 592 (1957); 93 Cong. Rec. 6437-6440 (1947).

There is evidence in this record indicating that the contributions to the Pipefitters' fund were, in the above sense, knowingly and voluntarily made. There is also substantial evidence to the contrary. But the jury was specifically instructed that it could find the defendants guilty even if it believed all of the contributions were voluntarily made.[2] Such an instruction was, in my view, erroneous.

The government acknowledges in its brief that a union acting through its officers, agents and members may form a political organization parallel to the union and use union personnel to solicit and spend direct voluntary contributions for federal elections. It concedes that COPE and countless other political action groups have been so organized and operated. The difficulty with this acknowledgement is that it comes too late. The trial court, although requested to, refused to give an instruction embodying this concept. Indeed, the thrust of its direction was that the very participation of union officers and

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use of general corporate funds this indictment meets these requirements. Entry of the plea of not guilty, therefore, gave rise to a question of fact as to the source of the corporate funds. When the Supreme Court, in the *Auto Workers* case, asked (352 U.S. at 592, 77 S.Ct. at 542): '[W]as the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis?' The Court was referring to questions of fact which must be resolved at the trial level and was not referring to any inadequacies in the indictment."

United States v. *Lewis Food Company*, 366 F.2d 710, 713 (9th Cir. 1966).

agents in the organization and operation of the political fund was evidence of impropriety. Compare, *Machinists Union* v. *Street*, 376 U.S. 70 (1961).

The government contends in its brief that the contributions to the fund were in fact assessments, were in fact part of the general dues' structure and were in fact involuntarily made. These may indeed be the facts and if the jury had made such a finding, a violation of Section 610 would have been made out. But again, this the jury was not requested to so find. It was instructed to answer the broader question of whether the contributed funds constituted a part of the Union funds. Nineteen facts and circumstances were listed as bearing on the answer to this question.[3] Some of the facts and circumstances

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2 "A great deal of evidence has been introduced on the question of whether the payments into the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund by members of Local 562 and others working under its jurisdiction were voluntary or involuntary. This evidence is relevant for your consideration, along with all other facts and circumstances in evidence, in determining whether the fund is a union fund. However, the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money."

3 "1. Whether or not payments to the fund were routinely made at regular intervals at job sites,

"2. Whether or not payments to the fund were routinely collected by union stewards, foremen, area foremen, general foremen, or other agents of the union,

"3. Whether or not the payment to the fund was determined by a formula based upon the amount of hours or overtime hours worked upon a job under the supervision of the union,

"4. Whether or not payments to the fund were at one rate for 562 members and at a different rate for members of other unions,

"5. Whether or not payments to the fund began, continued and terminated with employment on a job under the jurisdiction of the union,

"6. Whether or not monies of the fund were used to provide benefits to union members in their capacity as members,

"7. Whether or not payments to the fund by members of other unions were in lieu of payments to the union in the form of travel card dues in the amount of eight dollars per month,

were relevant to the issue of knowledge and voluntariness and others, irrelevant. One example of the latter was the instruction that the jury could consider whether the payments to the fund were routinely collected by the Union Stewards and agents of the Union at the job site.

The government further contends that the political funds were spent by the individual defendants arbitrarily and without consultation with the contributors. There is some evidence in the record to support this contention. Although such a practice is of questionable legality and is

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"8. Whether or not monies of the fund were used in part to promote activities properly permitted to the union pursuant to Section 2.05 of its Constitution and by-laws,

"9. Whether or not payments to the fund were made by those affiliated with the union to the general exclusion of other classes of persons or organizations,

"10. Whether or not contributions to the fund were required as a condition of employment or continued employment of membership in Local 562,

"11. Whether or not the individuals who contributed to said fund signed a voluntary contribution agreement,

"12. Whether or not the contributions to said fund were made voluntarily or involuntarily,

"13. Whether or not the monies contributed to said fund were kept separate and distinct from the funds of Local 562,

"14. Whether or not some persons who worked under the jurisdiction of Local 562 did not contribute to said fund,

"15. Whether or not the monies of said fund were used in part to promote activities which were prohibited to Local 562 by its Constitution and By-Laws,

"16. Whether or not said fund was established and maintained pursuant to the advice of counsel,

"17. Whether or not the monies of said fund were reported to the Department of Labor on the LM-2 forms, which required the reporting of monies of Local 562,

"18. Whether or not expenditures from the fund were under the control of the union and its officers,

"19. Whether or not records used in the collection of the payments to the fund are similar to those employed from time to time by the union in the collection of its regular dues and assessments."

undesirable and undemocratic, it constitutes no violation of Section 610.

The argument is also made by the government that at least one official of the fund diverted a portion of the funds collected for political purposes to his personal use. While this act may also have been illegal and reprehensible, it was not a violation of the statute.

Finally, the government contends on appeal that the fund was used to provide benefits to some of the members of the Union. There is again evidence in the record to support this contention, but the fact of the matter is that the fund was established for educational, legislative, charitable and defense as well as political purposes. And as I read Section 610, there is nothing in it which prohibits a union, its officers and agents from soliciting voluntary contributions for political and other purposes so long as those contributing know that all or part of the funds will be used in support of political candidates.

Nothing I have said in this opinion should be taken to indicate that a union or its officers and agents can evade the prohibitions of Section 610 by obtaining contribution cards from contributors indicating that the contributions were voluntarily made for political purposes. The test is whether the contributions are in fact so made.

It has been and is my opinnon that 18 U.S.C. §610 is clearly unconstitutional if construed as the majority opinion requires. I am equally convinced, however, that the constitutionality of the statute should not be decided until a conviction is obtained under proper instructions.

On two separate occasions in the last twenty-five years, the Supreme Court has been asked to decide the constitutionality of §610. It has declined to do so on both occasions. In *United States* v. *C.I.O.*, 335 U.S. 106 (1948), the

defendants were indicted under the statute for activities related to the publication and distribution of their weekly union periodical. The District Court dismissed the indictment, holding the statute to be an unconstitutional impairment of First Amendment rights. The government appealed the District Court's ruling under the Criminal Appeals Act, 18 U.S.C.A. §682. On appeal, both sides argued the constitutionality of the act. The Supreme Court, however, affirmed the dismissal of the indictment on the grounds, raised *sua sponte*, that the indictment did not charge an offense within the scope of the statute. The majority opinion noted the parties' preoccupation with the constitutional question, but stated:

> "We do not admit any duty in this Court to pass upon such a contention on an appeal under the Criminal Appeals Act except in cases of logical necessity."

Id. at 110.

Justice Frankfurter, in a concurring opinion, was even more circumspect about deciding the case. He noted, first, Chief Justice Marshall's observation that:

> "No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed." (Citation omitted.)

Id. at 125.

Frankfurter went on to argue that the entire case was not ripe for adjudication, concluding that:

> "I cannot escape the conclusion that in a natural eagerness to elicit from this Court a decision at the earliest possible moment, each side was at least un-

> wittingly the ally of the other in bringing before this Court far-reaching questions of constitutionality under circumstances which all the best teachings of this Court admonish us not to entertain.
>
> "But since my brethren find that the case calls for adjudication, I join in the Court's opinion. I do so because of another rule of constitutional adjudication which requires us to give a statute an allowable construction that fairly avoids a constitutional issue."

Id. at 129.

Nine years later, in *United States* v. *International Union, supra,* the Supreme Court was, for the second time, asked to decide the constitutionality of §610. There, the Court was again faced with an appeal from a District Court's dismissal of an indictment charging union violation of §610. The District Court had held that the indictment did not charge an offense under the statute and, therefore, did not rule on the constitutional questions. A careful study of legislative history of §610 convinced the Court that the acts charged in the indictment were within the prescriptions of the statute.

The Court, per Justice Frankfurter, then faced the union's contention that:

> "* * * [I]f * * * [the statute] * * * embraces the activity alleged in the indictment, it offends several rights guaranteed by the Constitution."

Justice Frankfurter declined to answer this contention, responding:

> "* * * Once more we are confronted with the duty of being mindful of the conditions under which we may enter upon the delicate process of constitutional adjudication.
>
> "The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against

passing on the validity of an Act of Congress 'unless absolutely necessary to a decision of the case.' Observance of this principle makes for the minimum tension within our democratic political system where 'scarcely any become, sooner or later, a subject of judicial debate.'

* * * * * * *

"Refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case. First of all, these questions come to us unilluminated by the consideration of a single judge—we are asked to decide them in the first instance. * * * *Finally by remanding the case for trial, it may well be that the Court will not be called upon to pass on the questions now raised.* * * *

"*Counsel are prone to shape litigation, so far as it is within their control, in order to secure comprehensive rulings.* This is true both of counsel for defendants and for the government. Such a desire on their part is not difficult to appreciate. *But the Court has its responsibility. Matter now buried under abstract constitutional issues may, by the elucidation of a trial, be brought to the surface, and in the outcome constitutional questions may disappear.*" (Citations omitted and emphasis added.)

Id. at 590-592.

In spite of the Supreme Court's obvious reluctance to decide the constitutionality of §610, as well as other legislative acts,[4] until absolutely necessary, our Court today rushes to do just that. My brother Matthes defends the action of the Court by arguing that the Courts of Appeals are rigidly bound to the literal wording of Rule 28(a)(2).

Rule 28(a)(2), which states in part that the brief of appellant shall contain "[a] statement of the issues presented for review," was primarily designed to clarify counsel's presentation of an appeal as well as to lighten

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[4] See, *e.g.*, *Mackey* v. *Mendoza-Martinez*, 362 U.S. 384 (1960); *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U.S. 129 (1946).

the labors of the court. *Thys Company* v. *Anglo California National Bank*, 219 F.2d 131 (9th Cir.), *cert. denied*, 349 U.S. 946 (1955); *Iva Ikuko Toguri D'Aquino* v. *United States*, 192 F.2d 338 (9th Cir. 1951). It was not designed to permit counsel to manipulate this Court to their own interest or to prevent this Court from meeting its responsibility. See, *United States* v. *International Union*, *supra*; *United States* v. *C.I.O.*, *supra*.

I recognize, as Justice Black enunciated in *Clay* v. *Sun Insurance Office*, 363 U.S. 207 (1960), that avoidance of constitutional questions is discretionary and should be used only under the proper circumstances. I can conceive of no circumstances more appropriate than those in this case. The minority's decision would remand the case to the District Court for trial under appropriate and proper instructions. It is possible that under such instructions, our Court will not be called upon to judge this Congressional act.

The Supreme Court's Rule 23(1)(c)[5] is similar, in scope and purpose, to our Rule 28(a)(2). Yet the Supreme Court has not felt the need to religiously follow this general rule in the face of other important policy considerations.[6]

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5 "*Rule 23. The petition for certiorari*

"1. The petition for writ of certiorari shall contain in the order here indicated—

* * * * * * *

"(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

6 This point is persuasively demonstrated by Chief Justice Warren's dissent in *Communist Party* v. *S.A.C. Board*, 367 U.S. 115, 119-121 (1961). The majority's failure to consider the issue urged there is not controlling in this case because of significant and material differences in the procedural postures of the two cases. At most, *Communist Party* was a case in which Justice Black's notion of using discretion in avoiding constitutional questions led to a result opposite of that here.

Nor have the appellate courts followed their own rule as strictly as Chief Judge Matthes would have us do. See, *e.g.*, *Platis* v. *United States*, 409 F.2d 1009 (10th Cir. 1969); *United States* v. *O'Connor*, 291 F.2d 520 (2nd Cir. 1961); *General Finance Loan Co.* v. *General Loan Co.*, 163 F.2d 709 (8th Cir. 1947).

Rule 28(a)(2) was intended to serve the Court, not to hamstring it. Long held notions of constitutional adjudication advise us to remand this case for a new trial with proper instructions. We should do so.

Judges Lay and Bright have authorized me to state that they join in this dissenting opinion, and I join in Judge Lay's dissent.

LAY, Circuit Judge, dissenting.

I would reverse the judgment below and remand for a new trial for the reasons set forth in Judge Heaney's dissenting opinion. I direct myself to the procedural question discussed in the concurring opinion.

First, I disagree with the majority that the trial court's instruction was not attacked as error by the defendants in their original briefs on appeal. Second, this court set aside the original submission of the appeal and directed anew the parties to file supplemental briefs for the benefit of the court en banc. The defendants specifically question the propriety of the instruction in their supplemental brief and the government did not raise the issue of abandonment or noncompliance with the Federal Rules of Appellate Procedure. Third, it is an equally "deeply entrenched principle" that in the public interest and to guard against manifest injustice this court will notice errors not properly raised for review, if such errors are obvious or otherwise seriously affect the fairness and integrity of the judicial proceeding.

There exists a fundamental discrepancy in the concurring opinion's restatement of the constitutional issues as raised by the defendants. The First Amendment issue is there stated to be:

> "Section 610 is unconstitutional because it abridged appellants' and all union members First Amendment rights."

However, the proposition stated in defendants' original brief is fashioned not as an abstraction but as a justiciable issue:

> "Section 610, Title 18, U.S.C., *as construed and applied by the Court below,* abridges the defendants' rights as well as the rights of all union members, of freedom of speech, press and assembly and the right to petition the Government for redress of grievances, in violation of the First Amendment of the Constitution of the United States." (My emphasis.)

The justiciable controversy is the application of § 610 *"as construed and applied by the Court below."* (My emphasis.) The district court's instruction to the jurors informed them the law of the case as it was actually tried. The district court instructed the jury; "[T]he mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money." The defendants' 98 page attack is explicitly *directed to this construction* of Section 610. To now urge that the district court's instruction is not raised as error by the defendants on appeal is to ignore the heart of the matter being litigated. Cf. *Terminiello* v. *Chicago,* 337 U.S. 1 (1949). It approaches appellate review in the celestial light of abstractness.

To follow the logic of the majority's theory of abandonment does more than to shackle the appellate process to whatever narrow remedy might be sought by a party. It

refuses as well any consideration of the broad congressional power given to this court under 28 U.S.C.A. § 2106,[1] and requires us to determine troublesome constitutional issues raised not by the congressional intent or enactment but by reason of the district court's narrow interpretation of the statute.

We should not pass upon the issue of the constitutionality of § 610 when it is not properly before us. The district court failed to instruct the jury that voluntary contributions to the fund are not within the scope of the statute. The statute does not and cannot proscribe use of voluntary funds. *United States* v. *Auto Workers,* 352 U.S. 567, 592 (1957); *United States* v. *C.I.O.,* 335 U.S. 106, 123 (1948). Not until the statute is given its intended construction should we weigh the constitutional issues presented. As the concurring opinion authoritatively concedes, constitutional validity of legislative action should not be passed upon until the conflict is unavoidable. See also *Thorpe* v. *Housing Authority,* 393 U.S. 268, 284 (1969); *Rosenberg* v. *Fleuti,* 374 U.S. 449, 451 (1963). As this writer observed in *In re Weitzman,* 426 F.2d 439, 454-55 (8 Cir. 1970), "the abandoning of a valid claim on appeal cannot dictate to the court when it must reach a constitutional issue." Thus, the majority, under the guise of allegiance to rules of procedure, admittedly setting aside well established principles of constitutional construction, must, because the parties so shaped the question, meet constitutional issues headon. As the concurring opinion concedes, this is simply not good policy, nor should it be.

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[1] Section 2106 reads:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

The majority opinion upholds the constitutionality of § 610. It does so without reference to the facts of the case, since the basis of the opinion completely disregards the district court's narrow and erroneous construction of the statute. In doing so, it overlooks that the defendants were convicted under the erroneous, and in my judgment, unconstitutional, application of the statute as encompassing funds voluntarily paid by union members for political activity. The majority justify their decision because they say the instruction itself is not attacked on appeal. The defendants' original brief belies this statement. The instruction is expressly attacked and defendants' counsel repeatedly and specifically explain the basis of the attack.[2]

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2 The instruction is set out on page 37 of defendants' brief. Defendants' brief argues:

"The Court also instructed that (A. p. 1116): 'the mere fact that the payments into the fund may have been *made voluntarily* by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money.'" p. 37.

"The Court below construed Section 610 as prohibiting officers, agents and members of a union from forming a parallel political organization and utilizing the union leaders, officers and agents in such political organization, in the obtaining, pooling and expending of direct voluntary contributions for political purposes." p. 59.

"The statute as construed denies individual rights of voluntary association for it forbids working men to associate and act through their labor leaders in the political field to protect their collective rights. This includes both their rights as union members and the rights of the union which they have joined. Even though the choice of candidates may determine whether those rights will be secured or destroyed, the statute as construed, prohibits union members from protecting and advancing those rights." p. 65.

". . . The Court instructed the jury that it could find that a separate voluntary political fund was in fact a union fund by any and all circumstances in evidence (A. pp. 1112-1115).

"This interpretation was made by the court despite the legislative history to the effect that a separate voluntary fund, such as the one here, is excluded from the criminal sanctions of Section 610 and without any judicial support or any prior prosecution (See Argument I, *supra*). Thus, as applied and interpreted by the lower court, Section 610 is unconstitutionally vague as it failed to give defendants fair warning of its scope and was a retroactive, unforeseeable judicial enlargement of the statute.

"Such a fortuitous judicial construction, analogous to legislative *ex post facto*, intensifies the vagueness of the statute and is even more

In essence, what the majority is saying is that although the district court's erroneous construction of the statute is raised on appeal, the defendants failed to ask for the right relief or remedy (a new trial), as a consequence of which the judgment must be affirmed. The federal rules governing procedure were never intended to punish a party for failure to seek the proper relief.[3] Decisions are replete holding that a court of appeals may shape the remedy regardless of the relief sought.[4] Section 2106 is

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so inimical to due process than if the statute is merely vague on its face." pp. 68-69.

"As such, the statute, as constructed by the district court, totally inhibits the fundamental freedoms of expression, assembly and petition guaranteed by the First Amendment (See Argument II, *supra*). Where a statute operates to restrain protected First Amendment freedoms, stricter standards of permissible statutory vagueness are to be applied," p. 72.

3 This application of the rules violates the spirit and letter of the rules themselves. Compare Rule 54(c) of Fed. R. Civ. P., which reads in part: "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*" (My emphasis.)

4 Compare *Turk* v. *United States*, 429 F.2d 1327 (8 Cir. 1970), an opinion in which Chief Judge Matthes joined, where because of insufficient evidence to justify an arrest and search we vacated a judgment of conviction, but remanded *sua sponte* for an evidentiary hearing on probable cause.

This court's recent remand in *Laclede Gas Co.* v. *NLRB*, 421 F.2d 610 (8 Cir. 1970), is viewed with jaundiced eye in the concurring opinion. It should be stated that a vigorous petition for a rehearing en banc was filed in that case. Not a single judge requested a vote for an en banc hearing and the petition was denied. Additionally unrecalled is the existence of compelling authority and reason for a court of appeals to remand to the National Labor Relations Board under such circumstances. See e.g., *Nuelsen* v. *Sorensen*, 293 F.2d 454, 462 (9 Cir. 1961), where the court said:

"Yet none of these theories were advanced in appellant's pleadings, stated as issues in the pre-trial order, presented in the trial court, or dealt with in the briefs on appeal. This court has refused to reverse on a ground not argued in the trial court. United States v. Waechter, 9 Cir., 195 F.2d 963.

"This accords with the general rule that an appellate court will not consider sua sponte arguments not presented or urged by the

authority and index to these decisions. See *Neely* v. *Eby Constr. Co.*, 386 U.S. 317 (1967).[5] FRAP is not concerned with *how* the issue is raised, but *what* is raised. To reason that a defendant is to be deprived of any relief from an erroneous conviction merely because he names the wrong remedy on appeal is reminiscent of the rigid and rationalized distinctions from the days of code pleading.[6]

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litigants. This restraint is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial forum is to decide and in order that the litigants not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037.

"There is, however, no rigid and undeviating judicially declared practice under which courts of review, invariably and under all circumstances decline to consider all questions which have not previously been specifically urged. Indeed there could not be without doing violence to the statutes which give federal appellate courts the power to modify, reverse or remand decisions 'as may be just under the circumstances.' 28 U.S.C.A. § 2106. Exceptional cases or particular circumstances may prompt a reviewing court, where injustice might otherwise result or where public policy requires, to consider questions neither pressed nor passed upon below. The power to raise and decide questions sua sponte is, however, to be exercised sparingly and with full realization of the restrictions and limitations inherent in its employment.

"Rather than consider the matter sua sponte, of course, the appellate court may note the existence of the unargued, undecided question and remand the case to the lower court. This makes the decision on the matter one reflecting the consideration of a trial court and the counsel in the case.

"In our opinion justice requires that such a course be followed in this case." (My emphasis)

5 In *Neely* the court of appeals had granted a judgment n.o.v. Although a motion for new trial was not presented by the verdict-holder on appeal nor by a petition for rehearing, the Supreme Court stated that "It was, of course, *incumbent* on the Court of Appeals to consider the new trial question in the light of its own experience with the case. But we will not assume that the court ignored its duty in this respect, although *it would have been better had its opinion expressly dealt with the new trial question.*" 386 U.S. at 329-30. (My emphasis.)

6 This recalls to mind Maitland's aphorism that "the forms of action we have buried, but they still rule us from their graves." Maitland, The Forms of Action at Common Law 296 (1909).

Assuming *arguendo* merit to the majority's view in the context of the original briefs, I add an additional word of concern. On August 19, 1970, this court ordered the panel's original judgment to be vacated and to have the case resubmitted to the court en banc. The clerk of the court was then directed to notify the parties that they could submit supplemental briefs. On September 10, 1970, Mr. Tucker wrote the parties:

> "Reference is made to the Court's order of August 19, 1970, vacating our previous judgment and reinstating the case on our calendar. I am directed by the Court to inform counsel that this appeal is to be submitted to the Court en banc on Wednesday, October 14, 1970, at 9 a.m.
>
> "Counsel for appellants may have to and including September 22, 1970, in which to file any additional briefs thought appropriate and counsel for appellee, United States, may have to and including October 1, 1970, in which to file additional brief.
>
> "Any subsequent briefs may be in typewritten form on lettersize paper and fastened in the left margin. I will need an original and seven copies of typewritten briefs which should, of course, be served on opposing counsel."

On September 17, 1970, the defendants submitted a supplemental brief requesting in the alternative a new trial, for the reason that:

> "The Court below erred in instructing the jury that it could find the defendants guilty even if it believed all of the contributions to the Political Fund were voluntarily made."

On September 29, 1970, the government responded solely to that proposition. Ironically, it is not the government that first raises the question of violation of the Federal Rules of Appellate Procedure.

The concurring opinion construes the Federal Rules of Appellate Procedure as inflexibly barring this court's

consideration of the erroneous instruction. Assuming solely for the sake of argument that one could reasonably say that the defendants did not properly attack the court's construction of the statute on appeal, the concurring opinion overlooks another "deeply entrenched principle" followed by this circuit. Senior Judge Vogel, when Chief Judge of this court, said in *Harris* v. *Smith*, 372 F.2d 806, 815 (8 Cir. 1967), "An additional ground of error, *although not urged on appeal*, should be noticed by this court because of its substantial effect upon the rights of the parties." (My emphasis.) Judge Vogel quoted from *General Finance Loan Co.* v. *General Loan Co.*, 163 F.2d 709, 711 (8 Cir. 1947), where the late Judge Thomas observed:

> "'We may, however, in our discretion consider a plain error apparent on the face of the record for the purpose of avoiding a manifest miscarriage of justice, or where the issue raised is one of public concern, even in a civil case. Kincade v. Mikles, 8 Cir., 144 F.2d 784; National Aluminate Corporation v. Permutit Co., 8 Cir., 144 F.2d 93.'"

And we said in *Lewis* v. *United States*, 340 F.2d 678, 683 (8 Cir. 1965), "'it (is) our duty to correct clear error' where shown to exist." See also *Harris* v. *United States*, 297 F.2d 491, 492 (8 Cir. 1961); *Page* v. *United States*, 282 F.2d 807, 810 (8 Cir. 1960); *United States* v. *353 Cases, Etc.*, 247 F.2d 473, 477 (8 Cir. 1957); *Cave* v. *United States*, 159 F.2d 464, 469 (8 Cir. 1947), cert. denied 331 U.S. 847, rehearing denied 332 U.S. 786. The concurring opinion's inflexible approach to appellate review is contrary to the view taken not only by this circuit, but by all other courts of appeals. In *United States* v. *Achilli*, 234 F.2d 797, 809 (7 Cir. 1956), aff'd 353 U.S. 373 (1957), the court said: "Rule 52(b) was designed to reach errors of such a substantial nature that they would, if not corrected, result in a manifest miscarriage of justice. [citing authority.] Inasmuch as errors within the comprehension of the provisions of this rule are those of such a nature

that they must be corrected to prevent a manifest injustice, it is incumbent upon a reviewing court to notice such error *sua sponte* although the issue presented *is not raised on appeal.*" (My emphasis.) In *Forakis* v. *United States,* 137 F.2d 581, 582 (10 Cir. 1943), the Court of Appeals for the Tenth Circuit observed: "That general rule [errors not preserved are not reviewable on appeal] bears the well recognized exception that where life or liberty is involved, an appellate court may notice and correct serious errors which were fatal to the rights of the accused even though they were not challenged or reserved." In *Gros* v. *United States,* 136 F.2d 878, 880-81 (9 Cir. 1943), reversed on rehearing 138 F.2d 260, the principle is similarly expressed: "It is obvious that it is immaterial in a court of justice whether the court sua sponte first recognizes and calls attention to a plain error 'absolutely vital to defendants' and that appellant's counsel then urges it, or that counsel first calls the appellate court's attention to the vital error." See also *Fisher* v. *United States,* 328 U.S. 463, 467-68 (1946); *Screws* v. *United States,* 325 U.S. 91, 107 (1945); *Reisman* v. *United States,* 409 F.2d 789, 791 (9 Cir. 1969); *McMillan* v. *New Jersey,* 408 F.2d 1375, 1377 n. 7 (3 Cir. 1969); *Garza-Fuentes* v. *United States,* 400 F.2d 219, 223 (5 Cir. 1968), cert. denied 394 U.S. 963 (1969); *Stephan* v. *United States,* 133 F.2d 87, 89-90 (6 Cir. 1943), cert. denied 318 U.S. 781 (1943).

I cannot judicially accept the reasoning that manifest injustice may take place in a criminal trial and yet lay beyond the reach of appellate review because a lawyer inadvertently failed to protect the defendant's rights in an appellate brief. There should exist no talismanic phrases to excite an appellate judge to recognize a miscarriage of justice in a criminal appeal. For an appeals judge to take effective action in these circumstances, even where counsel fails to properly preserve the error, is not advocacy, but rather an urgent and necessary exercise

of judicial responsibility. If this be proscribed as advocacy, the breadth and meaning of judicial review would have been rendered meaningless long ago. See generally Cardozo, The Growth of the Law (1924).[7]

As the Supreme Court has observed:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941).[8]

I am authorized to say that Judge Heaney and Judge Bright concur in this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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7 In this work Mr. Justice Cardozo, while on the New York Court of Appeals, observed:

"Every decision, where the judicial process is creative, and not merely static or declaratory, is a reflection of the problem and an expression of the answer. The philosophy may be inconsistent or unsound or distorted. The answers will share the vice, and be perverse or unwise or contradictory. The problem is always present. We shall not find the solution by acting as if there were nothing to be solved." At 21.

8 Mr. Justice Cardozo also reflected:

"The passing years have not brought to me the gift of wisdom, but they have at least opened my eyes to the perception that distinctions which in those early days seemed sharp and obvious are in truth shadowy and blurred, the walls of the compartments in no wise water-tight or rigid." Cardozo, supra n. 7 at 36.

APPENDIX C

JUDGMENT

United States Court of Appeals
For the Eighth Circuit

No. 19,466—September Term, 1970

United States of America,
Appellee,
v.
Pipefitters Local Union No. 562, St. Louis, Missouri, Affiliated With the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Lawrence L. Callanan, John L. Lawler and George Seaton,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgments and sentences of the said District Court appealed from in this cause be, and the same are each hereby, affirmed in accordance with the majority opinion of this Court this day filed herein.

And it is further ordered by this Court that the defendants in the said District Court, Lawrence L. Callanan, John L. Lawler and George Seaton, do surrender themselves to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgments and sentences imposed upon them, within thirty days from and after date of filing of the mandate of this Court in the District Court.

November 25, 1970

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

No. 19,466—September Term, 1970

United States of America,
Appellee,
vs.
Pipefitters Local Union No. 562, et al.,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellants for rehearing of the judgment of November 24, 1970, of the Court en banc, having been considered, it is now here ordered that the same be, and it is hereby, denied.

December 17, 1970

APPENDIX E

The following is the Statement of the Issues Presented for Review as they were contained in Petitioners' original brief in the Court of Appeals.

I

Whether the indictment alleged an offense and whether the evidence was sufficient to sustain a conviction for conspiracy to violate Section 610, Title 18, United States Code, where both showed that the funds expended for political purposes were not funds of the union, and were never commingled with the union funds, but instead were funds of a political organization which received its funds from direct voluntary contributions from individual members of the union and other individual pipefitters who worked under the jurisdiction of the Union.

II

Whether Section 610, Title 18, United States Code, **as construed and applied by the Court below**, abridges the defendants' rights, as well as the rights of all union members, of freedom of speech, press and assembly and the right to petition the Government for redress of grievances, in violation of the First Amendment of the Constitution of the United States.

III

Whether 18 United States Code, Section 610 **as construed and applied by the Court below** and on its face, is so vague, indefinite and uncertain as to deprive defendants of due process of law and fails to provide a reasonably ascertainable standard of guilt in violation of the Fifth and Sixth Amendments?

IV

Whether 18 United States Code, Section 610 is an unjustifiable arbitrary discrimination which deprives unions, its members, and persons of the laboring class of liberty and property without due process of law in violation of the Fifth Amendment?[1]

V

Whether Section 610, Title 18, United States Code, as **construed and applied by the Court below**, and on its face, unlawfully abridges the rights of defendants and all union members to vote and to choose their Senators and Representatives in Congress, as guaranteed by Article I, Section 2, and the Seventeenth Amendment to the Constitution of the United States.

VI

Whether the jury by making a special finding in its verdict "that a willful violation of Section 610 of Title 18, United States Code was not contemplated," found an essential element of any conspiracy under 18 U. S. C. Section 371 to violate a substantive statute which is malum prohibitum, lacking and thereby acquitted the defendants?

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1 **Excerpts From Argument IV in Appellants' Original Brief**

"Section 610, as construed by the district court, is such an unjustifiable discrimination as to violate the due process clause of the Fifth Amendment. Under the court's interpretation persons of the laboring class are practically prohibited from political action in any form, whereas those opposed to labor are given free rein to influence elections." (App. Br., pp. 77-78.)

* * *

"Defendants submit therefore, that the discrimination they sustain by Section 610's inherent inequality, particularly in view of the lower court's unwarranted judicial enlargement thereof, makes these statutes so unjustifiable within the meaning of **Bolling v. Sharpe**, *supra*, as to constitute an abridgment of the due process clause of the Fifth Amendment." (App. Br., p. 83.)